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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 740

JULIA C. GELFERT, AS SOLE SURVIVING EXECUTOR OF THE LAST WILL AND TESTAMENT OF JAMES J. CARPENTER, DECEASED, PETITIONER,

vs.

NATIONAL CITY BANK OF NEW YORK

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED FEBRUARY 1, 1941.

CERTIORARI GRANTED MARCH 3, 1941.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 13, 1941.

—1975

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[fol. 1]

IN COURT OF APPEALS OF NEW YORK

THE NATIONAL CITY BANK OF NEW YORK, Plaintiff-Appellant,

against

JULIA C. GELFERT, as Executor under the Last Will and Testament of James J. Carpenter, Deceased, Marie V. Carpenter, Dorothy R. Carpenter, Vivian D. Carpenter, Morris Ances, Doing Business as Morris Auto Supplies, Mary Carpenter, Michaels Bros., Abraham & Straus, Inc., The People of the State of New York and The United States of America, Defendants,

GEORGE U. HAMMOND, as Executor under the Last Will and Testament of James J. Carpenter, Defendant-Respondent

STATEMENT UNDER RULE 234

This action was commenced by the service of the summons and complaint on respondent on May 17th, 1938.

Respondent appeared herein by his attorneys on June 6th, 1938; said attorneys demanded service of all papers herein on them, but the respondent did not interpose an answer to the complaint.

The name of the original plaintiff is The National City Bank of New York.

The name of the original defendant-respondent is George U. Hammond, as Executor under the Last Will and Testament of James J. Carpenter, deceased.

[fol. 2] Plaintiff's attorneys are Zalkin & Cohen, Esqs.

Defendant-respondent's attorneys are McKercher & Link.

There has been no change of parties or attorneys herein.

Judgment was rendered in favor of the plaintiff and against the defendants Julia C. Gelfert and George U. Hammond, as executors under the Last Will and Testament of James J. Carpenter, Deceased, in the sum of $16,162.12, which judgment was entered in the office of the Clerk of the County of Kings on February 4, 1939, and was entered pursuant to an order of Mr. Justice May, dated February 2, 1939. The said order of Mr. Justice May granted the plaintiff's motion to confirm the report of the Referee to sell and to direct the entry of a deficiency judgment against the aforementioned defendants in the said sum of $16,162.12,

and denied the cross-motion of the defendant George U. Hammond, as executor, etc., for an order fixing the value of the foreclosed premises for the purpose of deficiency judgment proceedings.

An appeal was taken by the defendant George U. Hammond, as executor under the Last Will and Testament of James J. Carpenter, Deceased, to the Appellate Division, Second Department. The said appeal resulted in an order modifying the order of Mr. Justice May, dated February 2, 1939, by striking therefrom all of its directory provisions, except the denial of defendant's cross-motion and that part thereof which ratified and confirmed the Referee's report of sale, omitting therefrom the reference to a deficiency, and affirming the order as so modified and vacating the judgment entered February 4, 1939 pursuant to the said order. The judgment was vacated on September 1, 1939 [fol. 3] when the order of the Appellate Division and the remittitur were filed in the office of the Clerk of the County of Kings. The plaintiff appeals from the judgment entered September 1, 1939, vacating the prior judgment and appeals from the aforesaid order of the Appellate Division. The notice of appeal was served and filed on September 5, 1939.

In Supreme Court of New York, Kings County

6996/1938

The National City Bank of New York, Plaintiff,

against

Julia C. Gelfert and George U. Hammond, as Executors under the Last Will and Testament of James J. Carpenter, Deceased, Marie V. Carpenter, Dorothy R. Carpenter, Vivian D. Carpenter, Morris Ances, Doing Business as Morris Auto Supplies, Mary Carpenter, Michaels Bros., Abraham & Straus, Inc., The People of the State of New York and The United States of America, Defendants

Notice of Appeal to Appellate Division

Sirs:

Please take notice that the above named George U. Ham- [fol. 4] mond, as one of the Executors of the Last Will and Testament of James J. Carpenter, deceased, hereby appeals

to the Supreme Court, Appellate Division, Second Department, from the order made in the above entitled action and entered in the office of the Clerk of the County of Kings on the second day of February, 1939, confirming the referee's report of sale, dated December 22nd, 1938, denying the said defendant's cross-motion, and directing that a deficiency judgment in the sum of $16,162.12 be docketed, and this appeal is taken from the whole and from each and every part of said order and from each and every part of the judgment docketed pursuant to said order.

Dated, February 20, 1939.

Yours, etc., McKercher & Link, Attorneys for Defendant, George U. Hammond, as executor of the Last Will and Testament of James J. Carpenter, Deceased, 17 John Street, New York, New York.

To: Zalkin & Cohen, Esqs., Attorneys for Plaintiff, 19 Rector Street, New York, New York,

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[fol. 5] In Supreme Court of New York, Kings County

(Special Term—Part I)

Order Appealed From—February 2, 1939

A motion having been made by the plaintiff for an order overruling the exceptions filed by defendant George U. Hammond to the referee's report of sale herein, confirming said referee's report, and for a deficiency judgment for the amount of the deficiency reported by said referee with interest thereon from the date of said report; and the defendant George U. Hammond having made a cross-motion for an order fixing the real value of the premises foreclosed for the purpose of deficiency judgment proceedings; and said motion and cross-motion having duly come on to be heard;

Now, on reading the referee's report of sale, dated December 22, 1938 and heretofore filed herein, the exceptions of the defendant George U. Hammond, dated December 29, 1938 and heretofore filed herein, and upon reading and filing plaintiff's notice of motion dated January 11, 1939, the affidavit of Franklyn M. Stone, sworn to on January 11, 1939, and the exhibit thereto annexed, in support of said

motion, and proof of due service thereof, the notice of said [fol. 6] cross-motion dated January 20, 1939, the affidavit of George U. Hammond, sworn to on January 20, 1939 and the affidavit and the corrected affidavit of Donald J. Lyons, sworn to on January 19 and 20th, 1939, in support of said cross-motion, with proof of service thereof, the affidavits of Franklyn M. Stone and Harold M. Mills, both sworn to on January 24, 1939, in opposition to said cross-motion; and due deliberation having been had thereon, and upon filing the memorandum of the court dated January 31, 1939; and on motion of Zalkin & Cohen, Esqs., attorneys for plaintiff; it is

Ordered, that plaintiff's said motion be and the same hereby is granted in all respects and that the cross-motion of said defendant be and the same hereby is denied in all respects; and it is further

Ordered, that the report of sale made by David Senft, Referee, dated December 22, 1938, be and the same hereby is ratified and confirmed in all respects and the sale therein mentioned be and the same hereby is made absolute and binding forever, and the exceptions to said report taken by defendant George U. Hammond, dated December 29, 1938 are overruled; and it is further

Ordered, adjudged and decreed that the plaintiff, The National City Bank of New York (whose address is 55 Wall Street, in the Borough of Manhattan, City of New York) recover of the defendants Julia C. Gelfert and George U. Hammond, as Executors under the Last Will and Testament of James J. Carpenter, Deceased (the address of said Julia C. Gelfert being 825 East 13th Street, in the Borough [fol. 7] of Brooklyn, City of New York, and the address of said George U. Hammond being 129 Pearl Street, Borough of Manhattan, City of New York) the sum of $16,162.12, representing the deficiency reported by said referee, with interest thereon from December 22, 1938, the date of said referee's report, and the Clerk of this court is hereby directed to docket judgment therefor in favor of said plaintiff and against said defendants.

Enter.

Mitchell May, J. S. C.

Granted, Feb. 2, 1939.

John N. Harman, Clerk.

[fol. 8] JUDGMENT DOCKETED PURSUANT TO SAID ORDER

No. 10412

Names of Parties against whom Judgments have been obtained	Names of Parties in whose favor Judgments have been obtained
Julia C. Gelfert, 825 East 13th St., Bklyn.	
George U. Hammond 129 Pearl St., N. Y. C. as Executors of the Estate of James J. Carpenter	National City Bank of New York

Attorney's Name	Time of Filing	H.M.	Damages and Costs Deficiency
Zalkin & Cohen	Feb. 4 1939	10:20	$16,162.12 Interest from Dec. 22, 1938

COUNTY CLERK'S OFFICE,
Kings County, Apr. 21, 1939, ss:

I, John N. Harman, Clerk of the County of Kings, do hereby Certify the foregoing is a correct transcript from the Docket of Judgments kept in my office, of a Judgment rendered in the Supreme Court for said County.

John N. Harman, Clerk.

[fol. 9] IN SUPREME COURT OF NEW YORK

PLAINTIFF'S MOTION TO CONFIRM REFEREE'S REPORT OF SALE

SIRS:

Please take notice that upon the annexed affidavit of Franklyn M. Stone, sworn to the 11th day of January, 1939, and upon the report of David Senft, Referee, dated and verified the 22nd day of December, 1938 and filed in the office of the Clerk of the County of Kings on the 24th day of December, 1938, and the exceptions to said report taken in behalf of the defendant George U. Hammond, and upon the judgment of foreclosure and sale herein, and the papers

and proceedings had herein, the undersigned will move at Special Term, Part I of the Supreme Court, Kings County, appointed to be held in the County Courthouse, Court and Joralemon Streets, Borough of Brooklyn, City and State of New York, on the 23rd day of January, 1939, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order overruling the aforesaid exceptions, confirming the said Referee's report and making absolute and binding forever the sale therein mentioned, and adjudging that plaintiff recover of the defendants Julia C. Gelfert and George U. Hammond, as Executors under the Last Will and Testament of James J. Carpenter, Deceased, the sum of $16,162.12 representing the deficiency reported by said Referee with interest thereon from the 22nd day of December, 1938 and for such other and further relief as [fol. 10] may be just, equitable and proper.

Dated, New York, January 11, 1939.

Yours, etc., Zalkin & Cohen, Attorneys for Plaintiff, Office & P. O. Address, 19 Rector Street, Borough of Manhattan, City of New York.

To:

McDermott & Turner, Attorneys for defendant, Julia C. Gelfert, etc., 165 Broadway, N. Y. C.

McKercher & Link, Attorneys for Defendant, George U. Hammond, etc., 17 John Street, N. Y. C.

John J. Bennett, Jr., Attorney for Defendant, The People of the State of New York, The Capitol, Albany, New York.

Jacob Wittner, Esq., Guardian ad litem for Defendant, Vivian D. Carpenter, 545 Fifth Avenue, New York, N. Y.

[fol. 11] IN SUPREME COURT OF NEW YORK

AFFIDAVIT OF FRANKLYN M. STONE, IN SUPPORT OF MOTION TO CONFIRM REFEREE'S REPORT OF SALE

CITY, COUNTY AND STATE OF NEW YORK, ss:

Franklin M. Stone, being duly sworn, deposes and says:

That he is an attorney at law associated with the attorneys for the plaintiff in this action and has had charge of and is familiar with the proceedings had herein.

Pursuant to the judgment of foreclosure and sale, dated the 15th day of November, 1938 and filed herein on said date, the mortgaged premises were duly sold by David Senft, Esq., the Referee appointed by said judgment to make the sale, and the proceeds of the sale were disposed of pursuant to said judgment as appears by said Referee's report of sale, dated and verified the 22nd day of December, 1938, and filed herein on the 24th day of December, 1938.

That notice of the filing of said Referee's report was duly served upon the attorneys for the defendants entitled to notice thereof and upon the Guardian ad litem for the infant defendant Vivian D. Carpenter, as appears by the original of said notice hereto annexed and made a part hereof, and by the affidavit of Goldie Press, sworn to the 24th day of December, 1938, showing service of said notice on said attorneys and said Guardian ad litem, which affidavit of service is hereto annexed and made a part hereof.

That more than eight days have elapsed since said Referee's report was filed and that no exceptions to said re-
[fol. 12] port have been taken, excepting in behalf of defendant George U. Hammond. Annexed hereto and made a part hereof is a certificate of the Clerk of the County of Kings, dated January 10, 1939, certifying that no exceptions were filed to said report. Nevertheless, there was served upon the attorneys for the plaintiff exceptions to said report taken in behalf of defendant George U. Hammond, which exceptions bear date the 29th day of December, 1938, and to which reference will be further made herein. That the time for filing exceptions to said Referee's report has expired.

That the exceptions filed in behalf of defendant George U. Hammond are (1) that the price at which the property was sold herein was wholly inadequate, unconscionable and inequitable, (2) that the sale price is so low as not to be a sale within the meaning of the Civil Practice Act, (3) that no deficiency judgment should be permitted to be entered herein.

That said exceptions are insufficient in law and should be overruled for the following reasons: The mortgage foreclosed in this action was executed and delivered on December 29, 1932, and neither the provisions of Section 1083-a of the Civil Practice Act nor the amendment to Section 1083 of said Act (in effect on April 7, 1938) are applicable to this action and the court does not, therefore, possess

statutory power to inquire into the value of the mortgaged premises at the time of the sale and limit or deny a judgment for the deficiency reported by the Referee; that the judgment of foreclosure and sale entered herein on November 15, 1938, which provides that plaintiff may apply at the foot of said judgment for judgment against defendants Julia C. Gelfert and George U. Hammond, as Executors under the [fol. 13] Last Will and Testament of James J. Carpenter, Deceased (the mortgagor) for such deficiency as the plaintiff may be entitled to, is final as to the deficiency reported by said Referee and inasmuch as said judgment has not been vacated, this court is not authorized or empowered to revise said final judgment by sustaining any of the aforesaid exceptions and limiting or denying a judgment for the deficiency reported by said Referee; and that said exceptions are not based upon any alleged fraud or inequitable or improper conduct on plaintiff's part in reference to the sale had herein and the court is, therefore, not authorized or empowered to deny a deficiency judgment or order a resale even if it be assumed, although it is not admitted that the price at which the property sold herein is less than the market value of the property on the date of the sale.

As a matter of fact, deponent has been informed by a real estate expert employed by The National City Realty Company that the fair and reasonable value of the mortgaged property at the time the same was sold herein was $6,000. Inasmuch as the property was sold herein for the sum of $4,000, there having been no other bidders at the sale, the amount so paid for the property upon the sale cannot under any circumstances be deemed to be unconscionable.

Deponent therefore requests that an order be made herein overruling said exceptions, confirming in all respects said Referee's report of sale and making absolute and binding forever the sale therein mentioned, and adjudging that the plaintiff recover of the defendants Julia C. Gelfert and George U. Hammond, as Executors under the Last Will and Testament of James J. Carpenter, Deceased, the sum of [fol. 14] $16,162.12, being the deficiency reported by said Referee, with interest thereon from December 22, 1938, the date of said Referee's report, and directing that the Clerk of this court docket judgment therefor.

Franklyn M. Stone.

(Sworn to January 11, 1939.)

CERTIFICATE OF THE CLERK OF THE COUNTY OF KINGS, DATED JANUARY 10, 1939, ANNEXED TO FOREGOING AFFIDAVIT

Kings County Clerk's Office

Brooklyn

No. 2912

Vol. 526, Page 219, File No. 6996, Year 1938

[Same Title]

CITY AND STATE OF NEW YORK,
County of Kings, ss:

I, John N. Harman, Clerk of the County of Kings, do hereby certify that I have carefully examined the records of my office from the 24th day of December, 1938, to date, for any exceptions to Referee's Report of Sale and fail to find the same on file therein.

Witness, my hand and Official Seal, this 10th day of Jan., 1939.

John N. Harman, County Clerk of Kings County.
(Seal)

[fol. 15] NOTICE OF FILING REFEREE'S REPORT, ANNEXED TO FOREGOING AFFIDAVIT

SIRS:

Please take notice that the report of David Senft, Esq., the Referee appointed by the judgment in this action to sell the mortgaged premises, was duly filed in the office of the Clerk of the County of Kings on the 24th day of December, 1938.

Dated, New York, December 24, 1938

Yours, etc., Zalkin & Cohen, Attorneys for Plaintiff, Office & P. O. Address, 19 Rector Street, Borough of Manhattan, City of New York.

To:

McDermott & Turner, Attorneys for Defendant, Julia C. Gelfert, etc., 165 Broadway, N. Y. C.

McKercher & Link, Attorneys for Defendant, George U. Hammond, etc., 17 John St., N. Y. C.

John J. Bennett, Jr., Attorney for Defendant, The People of the State of New York, The Capitol, Albany, N. Y.

Jacob Wittner, Esq., Guardian ad litem for Defendant, Vivian D. Carpenter, 545 Fifth Avenue, N. Y. C.

[fol. 16] AFFIDAVIT OF GOLDIE PRESS, ANNEXED TO FOREGOING AFFIDAVIT

STATE OF NEW YORK,
County of New York, ss:

Goldie Press, being duly sworn, deposes and says:

That she is a clerk in the employ of Zalkin & Cohen, attorneys for the plaintiff in the above entitled action and is over the age of eighteen years.

That on the 24th day of December, 1938, she served the annexed notice of filing of the Referee's Report of Sale upon the attorneys for defendants in this action and upon the Guardian ad litem for the defendant, Vivian D. Carpenter, whose names are hereinafter set forth, by depositing true copies of said notice in a post office box regularly maintained by the United States Post Office at 19 Rector Street, Borough of Manhattan, City of New York, and that the same were properly enclosed in post-paid wrappers addressed as follows:

McDermott & Turner, Esqs., 165 Broadway, New York, N. Y.

McKercher & Link, Esqs., 17 John Street, New York, N. Y.

John J. Bennett, Jr., The Capitol, Albany, New York.

Jacob Wittner, Esq., 545 Fifth Avenue, New York, N. Y.

those being the office addresses designated by said attorneys and by said Guardian ad litem in the last papers served by them.

Goldie Press

(Sworn to December 24, 1938)

[fol. 17] IN SUPREME COURT OF NEW YORK

REFEREE'S REPORT OF SALE

To the Honorable the Supreme Court of the State of New York:

I, David Senft, the Referee appointed by the judgment of this court dated and entered herein the 15th day of November, 1938, to make the sale of the mortgaged lands and premises therein particularly described and directed to be sold, do respectfully report as follows:

1. I caused due notice of the sale of said lands and premises by me at public auction held on the 16th day of December, 1938, at twelve o'clock noon at the Brooklyn Real Estate Exchange located at 189 Montague Street, in the Borough of Brooklyn, County of Kings, City and State of New York, to be given and published according to law and the rules of practice of this court and containing a description of the property to be sold conforming in all respects with the description set forth in said judgment, as more fully appears by the annexed affidavit of Goldie Press, sworn to the 30th day of November, 1938, showing due service of a printed notice of such sale upon the attorneys for the defendants who were entitled to notice thereof and upon the Guardian ad litem for Vivian D. Carpenter, the infant defendant herein, and by the annexed affidavit of Hubert Davies, sworn to the 21st day of December, 1938, and the annexed affidavit of C. J. Marquart, sworn to the 16th day of December, 1938, showing the due publication of a copy of such notice of sale at least twice a week in each of [fol. 18] the three successive weeks immediately preceding the sale in the Brooklyn Daily Eagle and in the Brooklyn Citizen, being newspapers published daily in the Borough of Brooklyn, County of Kings, City and State of New York, where the mortgaged lands and premises are situated.

2. That at the time and place for which said sale was noticed as aforesaid, I attended in person, and, agreeably to such notice, offered the said lands and premises for sale to the highest bidder by Thomas F. Layden, Auctioneer, upon the terms of sale hereto annexed and publicly read said notice of sale and said terms of sale previous to the bidding, and that the said mortgaged lands and premises were then and there struck off and sold to Matin Realty, Inc., for the sum of Four Thousand and 00/100 ($4,000) Dollars, that being the highest sum bid therefor, the said Matin Realty, Inc., being the nominee of the plaintiff, as appears by the certificate of plaintiff's attorneys annexed hereto; and that payment of ten (10%) per cent of that sum and all taxes, assessments, water rates and interest and penalties thereon were waived by plaintiff's attorneys in writing, as appears by such waiver hereto annexed.

3. Plaintiff being the purchaser of the mortgaged lands and premises, by its said nominee, I did not require payment of the amount so bid but received from the plaintiff on

account of such purchase money the sum of One Hundred and 00/100 ($100.00) Dollars for my services; I allowed to and credited plaintiff with the following amounts: Three Hundred and Ten and 40/100 ($310.40) Dollars representing costs and disbursements taxed as per bill of costs ex-
[fol. 19] hibited to me; the sum of Two Hundred and 00/100 ($200.00) Dollars representing the additional allowance awarded to plaintiff by the judgment of foreclosure and sale; the sum of One Hundred Thirty-six and 10/100 ($136.10) Dollars representing the cost of advertising said notice of sale; the sum of Five and 00/100 ($5.00) Dollars representing the fee of the Brooklyn Real Estate Exchange; the sum of Twenty-five and 00/100 ($25.00) Dollars representing the fee of the auctioneer; and the sum of Four and 00/100 ($4.00) Dollars representing documentary stamp tax upon the Referee's deed; and annexed hereto are receipts for the aforesaid sums so allowed and credited by me. Pursuant to the judgment herein, which provides that the purchaser shall be credited on account of the purchase price with the amount of taxes, assessments and water rates with interest and penalties thereon, upon waiver of the payment thereof in writing, and payment thereof having been waived as per written waiver hereto annexed, I also allowed to and credited the plaintiff with the sum of Eight Hundred Sixty-seven and 15/100 ($867.15) Dollars representing unpaid taxes and water rates, proof thereof having been exhibited to me.

4. I have made, executed and delivered to said Matin Realty, Inc., the nominee of the plaintiff and the purchaser upon the aforesaid sale, a good and sufficient deed of conveyance of the mortgaged lands and premises containing the description set forth in the judgment.

5. I have credited the plaintiff with the sum of Two Thousand Three Hundred Fifty-two and 35/100 ($2,352.35) Dollars, being the balance of the purchase price.

[fol. 20] 6. There remains, therefore, a deficiency in the sum of Sixteen Thousand One Hundred Sixty-two and 12/100 ($16,162.12) Dollars with interest thereon from the date of this report.

7. Said premises were sold, and the aforesaid deed executed by me conveyed the premises subject to easements, if any, covenants and restrictions, if any, contained in any

prior recorded instruments, building restrictions and regulations contained in resolution or ordinance adopted by the Board of Estimate and Apportionment of the City of New York on July 25, 1916, and amendments and additions thereto now in force, and also subject to any state of facts which an accurate survey may show, and also subject to unpaid taxes, assessments and water rates with interest and penalties thereon.

8. Annexed hereto and made a part of this report is a statement showing the several items aforesaid and the mode of computation of said deficiency.

All of which is respectfully submitted.

Dated, December 22, 1938.

David Senft, Referee.

[fol. 21] ADVERTISEMENT OF SALE

The premises described in the annexed advertisement of sale will be sold under the direction of the undersigned Referee upon the following terms:

1. Ten (10%) per cent of the purchase money will be required to be paid to the said Referee at the time and place of the sale and for which the Referee's receipt will be given; and in case the plaintiff or any nominee of the plaintiff shall become the purchaser at the sale, they shall not be required to make the aforesaid payment.

2. The residue of the purchase money will be required to be paid to David Senft, Esq., said Referee, at his office located at No. 26 Court Street, Borough of Brooklyn, County of Kings, City and State of New York, on the 23rd day of December, 1938 at 2 o'clock in the afternoon of that day, when said Referee's deed will be ready for delivery.

3. The Referee is not required to send any notice to the purchaser or purchasers, and if the purchaser or purchasers neglect to call at the time and place above specified to receive his or their deed, he or they will be charged with interest thereafter on the whole amount of the purchase unless the Referee shall deem it proper to extend the time for the completion of said purchase.

4. All taxes, assessments and water rates, with interest and penalties thereon, which at the time of the sale are liens

[fol. 22] or encumbrances upon said premises, will be allowed by the Referee out of the purchase money, provided the purchaser or purchasers shall, previous to the delivery of the deed, produce to the Referee proof of such liens and duplicate receipts for the payment thereof, unless the plaintiff or its attorneys shall waive the payment thereof in writing, in which event the Referee will convey the mortgaged premises subject to the lien thereof and the purchaser or purchasers shall be credited with the amount of such taxes, assessments and water rates, and interest and penalties thereon, on account of the purchase price.

5. The purchaser of said premises will, at the time and place of sale, sign a memorandum of his purchase, and an agreement to comply with the terms and conditions of sale herein contained, and pay, in addition to the purchase money, the auctioneer's fee of $ —.

6. The bidding will be kept open after the property is struck down and in case the purchaser shall fail to comply with any of the above conditions of sale, the premises so struck down will be again put up for sale under the direction of said Referee and under the terms of sale, without application to the Court, unless plaintiff's attorneys shall elect to make such application, and such purchaser will be held liable for any deficiency there may be between the sum for which said premises shall be struck down upon the sale and that for which they may be purchased under resale, and also for any costs and expenses occurring on such resale.

7. The premises will be sold, as set forth in the notice of sale, subject to easements, if any, covenants and restric-[fol. 23] tions, if any, contained in any prior recorded instruments, building restrictions and regulations contained in resolution or ordinance adopted by the Board of Estimate and Apportionment of the City of New York on July 25, 1916, and amendments and additions thereto now in force, and also subject to any state of facts which an accurate survey may show.

Dated, December 16th, 1938.

David Senft, Referee.

MEMORANDUM OF SALE

The undersigned has this 16th day of December, 1938, purchased the premises described in the above annexed

printed advertisement of sale, for the sum of $ — and hereby promises and agrees to comply with the terms and conditions of the sale of said premises as above mentioned and set forth.

Dated, December 16th, 1938.

Matin Realty Inc., Per F. M. Stone, Purchaser, 55 Wall Street, New York City, N. Y.

Payment of ten (10%) per cent of the purchase money, at the time and place of sale, is hereby waived.

[fol. 24] Payment of taxes, assessments and water rates, and interest and penalties thereon, is hereby waived.

Dated, December 16, 1938.

Zalkin & Cohen, Attorneys for Plaintiff. David Senft, Referee.

We hereby certify that Matin Realty, Inc., the purchaser at the foreclosure sale held this day, is the nominee of The National City Bank of New York, the plaintiff in this action.

Dated, December 16, 1938.

Zalkin & Cohen, Attorneys for Plaintiff.

Allowance and credit to plaintiff of the following sums is hereby acknowledged:

Plaintiff's costs and disbursements as taxed	$310.40
Additional allowance awarded to plaintiff	200.00

Dated, December 22, 1938.

Zalkin & Cohen, Attorneys for Plaintiff.

[fol. 25] AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
County of New York, ss:

GOLDIE PRESS, being duly sworn, deposes and says, that she is a clerk in the employ of Zalkin & Cohen, the attorneys for the plaintiff in the above entitled action and is over the age of eighteen years.

That on the 30th day of November, 1938, she served the annexed Notice of Sale upon the attorneys for defendants in this action and upon the Guardian ad Litem for defend-

ant Vivian D. Carpenter, whose names are hereinafter set forth, by depositing true copies of such Notice of Sale in a post office box regularly maintained by the United States Post Office at 19 Rector Street, Borough of Manhattan, City of New York, and that the same were properly enclosed in post-paid wrappers addressed as follows:

McDermott & Turner, 165 Broadway, New York, N. Y.
McKercher & Link, 17 John Street, New York, N. Y.
Jacob Wittner, 545 Fifth Avenue, New York, N. Y.
Conroy & Hardy, 32 Court Street, Brooklyn, New York.
Otto A. Samuels, 300 Madison Avenue, New York, N. Y.
John J. Bennett, Jr., The Capitol, Albany, New York.

those being the office addresses designated by said attorneys and by said Guardian ad Litem in the last papers served by them.

Goldie Press.

(Sworn to November 30, 1938.)

[fol. 26] NOTICE OF SALE

SIRS:

Please take notice that annexed hereto is a true copy of the Notice of Sale of the mortgaged premises herein, pursuant to the judgment of foreclosure and sale made and entered herein.

Dated, New York, November 26, 1938.

Yours, etc., Zalkin & Cohen, Attorneys for Plaintiff, Office and P. O. Address, 19 Rector Street, New York City.

To:

McDermott & Turner, Attorneys for Julia C. Gelfert.
McKercher & Link, Attorneys for George U. Hammond.
Jacob Wittner, Guardian ad Litem.
Conroy & Hardy, Attorneys for Abraham & Straus, Inc.
Otto A. Samuels, Attorney for Michaels Bros.
John J. Bennett, Jr., Attorney for People of the State of New York.

[fol. 27] SUPREME COURT, KINGS COUNTY

The National City Bank, of New York, plaintiff against Julia C. Gelfert, et al., defendants.

Pursuant to a judgment herein, dated November 15, 1938, I will sell at public auction to the highest bidder, by Thomas F. Layden, auctioneer, at the Brooklyn Real Estate Exchange, located at 189 Montague Street, in the Borough of Brooklyn, County of Kings, City and State of New York, on the 16th day of December, 1938, at 12 o'clock noon, the mortgages premises located in the Borough of Brooklyn, City of New York, directed by said judgment to be sold, with the improvements thereon, described as follows:

All the certain lot, piece or parcel of land, situate, lying and being in the Borough of Brooklyn, County of Kings, State of New York, bounded and described as follows:

Beginning at a point on the corner formed by the intersection of the northerly side of 38th Street with the easterly side of 4th Avenue; running thence northerly along the easterly side of 4th Avenue, 25 feet, 2 inches; thence easterly parallel with 38th Street, 100 feet; thence southerly parallel with 4th Avenue, 25 feet, 2 inches to the northerly side of 38th Street and thence westerly along the northerly side of 38th Street, 100 feet, to the point or place of beginning.

Together with all the right, title and interest, if any, of the parties hereto of the first part, in and to the land of 38th Street and 4th Avenue, to the centre thereof, in front of and adjoining said premises.

Subject to easements, if any, covenants and restrictions, if any, contained in any prior recorded instruments, building restrictions and regulations contained in resolution or [fol. 28] ordinance adopted by the Board of Estimate and Apportionment of the City of New York on July 25, 1916, and amendments and additions thereto now in force, and also subject to any state of facts which an accurate survey may show.—Dated November 23rd, 1938.

David Senft, Referee.

Zalkin & Cohen, Attorneys for Plaintiff, 19 Rector Street, New York, N. Y.

STATEMENT

Amount due upon obligation and mortgage, as per judgment			$18,401.25
Interest thereon from November 15, 1938 to December 22, 1938, date of closing			113.22
			$18,514.47
Amount of Purchase Money		$4,000.00	
Deductions, allowances and credits:			
Referee's fees	$100.00		
Taxed costs	310.40		
Extra allowance	200.00		
Advertising sale	136.10		
Exchange fee	5.00		
Auctioneer's fee	25.00		
Stamp tax on deed	4.00		
Unpaid taxes and water rates	867.15	1,647.65	
			2,352.35
Deficiency			$16,162.12

Dated, December 22, 1938.

David Senft, Referee.

(Verified December 22, 1938.)

[fol. 29] IN SUPREME COURT OF NEW YORK

EXCEPTIONS TO REFEREE'S REPORT OF SALE

SIRS:

Please take notice that the defendant, George U. Hammond, as one of the executors of the Last Will and Testament of James J. Carpenter, hereby excepts to the report of sale filed herein by David Senft, Esq., the referee appointed by this Court to sell the premises described in the complaint in the above entitled action in the following particulars:

1. That the price at which said property was sold was wholly inadequate, unconscionable and inequitable.

2. That the sale price is so low as not to be a sale within the meaning of the Civil Practice Act.

3. That no deficiency judgment should be permitted to be entered herein.

Dated, New York, December 29, 1938.

Yours, etc., McKercher & Link, Attorneys for George U. Hammond as one of the Executors of the Last Will and Testament of James J. Carpenter, deceased, 17 John Street, New York, New York.

To: Zalkin & Cohen, Esqs., Attorneys for Plaintiff, 19 Rector Street, New York, New York.

[fol. 30] McDermott & Turner, Esqs., Attorneys for Defendant, Julia C. Gelfert, etc., 165 Broadway, New York, New York.

John J. Bennett, Jr., Esq., Attorney for Defendant, People of the State of New York, The Capitol, Albany, New York.

Jacob Wittner, Esq., Guardian Ad Litem for Defendant, Vivian D. Carpenter, 545 Fifth Avenue, New York, New York.

IN SUPREME COURT OF NEW YORK

DEFENDANT'S CROSS-MOTION

SIRS:

Please take notice that upon the annexed affidavit of George U. Hammond, sworn to the 20th day of January, 1939, and the affidavit of Donald J. Lyons, sworn to the 19th day of January, 1939, and upon all of the proceedings heretofore had herein, the undersigned will move this court at a Special Term, Part I thereof, to be held at the County Courthouse, Borough of Brooklyn, City of New York, on the 23rd day of January, 1939, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, by way of cross-motion, for an order fixing the real [fol. 31] value of the premises foreclosed for the purposes of deficiency judgment proceedings upon the ground that it would be inequitable and unconscionable to permit the plaintiff herein to enter a deficiency judgment as demanded in the notice of motion dated January 11th, 1939, upon the ground that the sale price was wholly inequitable and ur-

conscionable and for such other and further relief as to the court may seem just and proper.

Dated, January 20th, 1939.

McKercher & Link, Attorneys for Defendant, George U. Hammond as Executor, etc., 17 John Street, New York, New York.

To:

Zalkin & Cohen, Esqs., Attorneys for Plaintiff, 19 Rector Street, New York, New York.

McDermott & Turner, Esqs., Attorneys for Defendant, Julia C. Gelfert as Executrix, etc., 165 Broadway, New York, New York.

Jacob Wittner, Esq., Guardian ad litem for Defendant, Vivian D. Carpenter, 545 Fifth Avenue, New York, New York.

John J. Bennett, Jr., Esq., Attorney for Defendant, The People of the State of New York, The Capitol, Albany, New York.

[fol. 32] AFFIDAVIT OF GEORGE U. HAMMOND, IN OPPOSITION TO MOTION TO CONFIRM REFEREE'S REPORT OF SALE AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION.

STATE OF NEW YORK,
County of New York, ss:

George U. Hammond, being duly sworn says that he is one of the executors of the estate of James J. Carpenter, deceased, and is one of the defendants named herein and he makes this affidavit in opposition to the plaintiff's motion dated January 11th, 1939, and also in support of your deponent's cross-motion for the relief demanded in the annexed notice of motion.

This action was brought to foreclose a mortgage upon the property described in the complaint which mortgage was given as collateral security under a written agreement dated April 19th, 1928, which guarantee was signed by James J. Carpenter, who was the owner of said premises.

Simultaneously with the execution of the mortgage by Mr. Carpenter, there was delivered to the plaintiff herein by George U. Hammond, individually, a mortgage covering certain premises located in Orange County, New York. The Orange County property has been foreclosed and at the

present time there is pending before Mr. Justice Aldrich an application similar to the present application for a deficiency judgment. Mr. Justice Aldrich has handed down a decision referring the matter to a former justice of the Appellate Division, Mr. Justice Seeger, official referee, to take testimony and report with respect to (1) the fair and [fol. 33] reasonable market value at the date of the sale so that the court may determine whether the sale as made is unconscionable, and (2) whether the existing facts and circumstances are such that the premises should be sold subject to an inchoate right of dower, if any.

The amount claimed to be due the plaintiff herein as shown in the referee's report of computation is based upon monies due the plaintiff from a corporation then known as Hammond & Carpenter Corporation. The decedent, James J. Carpenter, and George U. Hammond, had personally guaranteed all monies due from said corporation to the plaintiff herein.

The property which has been foreclosed is more fully described in the annexed affidavit of appraisal. Said property is rented to the Morris Auto Supplies at a monthly rental of $75.00 a month. A small one car garage in the rear of these premises is also rented for $9.00 per month. In addition, the decedent's mother occupies a four room apartment in said premises. The total rental value of said premises is, therefore, in excess of $100.00 per month.

Said premises are assessed for New York City taxes in the sum of $15,000.00 for the total tax of about $417.00.

The plaintiff has bid in the property on the foreclosure sale at a price of $4,000.00, and your deponent respectfully submits that it is inequitable and unconscionable to permit the plaintiff to receive the premises in question at a price of $4,000.00 when the total rental value is in excess of $1,200.00 per year and is assessed for City tax purposes at $15,000.00.

There is a further reason why the plaintiff's action herein is inequitable and unconscionable. As above stated, the [fol. 34] source of the obligation arose upon a guarantee by the decedent, James J. Carpenter, of a corporation's obligation, which guarantee was signed in the year 1928. The plaintiff has its remedies against the corporation, and it also has its remedies, which it is exercising simultaneously herewith, against the other guarantor, George U. Hammond, individually. Your deponent, therefore, re-

spectfully submits that it would be inequitable and unconscionable to permit the plaintiff herein to take the property in question under the foreclosure without crediting the estate of James J. Carpenter with the real value of said premises and permitting plaintiff to keep the premises, dispose of the same, and secure a deficiency judgment of over $16,000.00.

(Sworn to January 20, 1939.)

AFFIDAVIT OF DONALD J. LYONS, IN SUPPORT OF DEFENDANT'S CROSS-MOTION

BOROUGH OF BROOKLYN,
County of Kings, ss:

DONALD J. LYONS, being duly sworn, deposes and says:

That he is a duly licensed Real Estate Broker in and for the State of New York.

That he resides at 533 Nostrand Avenue in the Borough of Brooklyn, County of Kings, City and State of New York. [fol. 35] That he has been actively engaged in the Real Estate business for the past twenty-five years and maintains an office for the practice of such business at 531 Nostrand Avenue in the Borough of Brooklyn, County of Kings, City and State of New York.

That he is thoroughly familiar with Real Estate values in the Borough of Brooklyn, County of Kings, City and State of New York, having acted as Broker in many transactions involving the sale, rental and mortgaging of Real Estate, particularly in the vicinity of the corner of Fourth Avenue and Thirty-eighth Street in that Borough.

That on the eighteenth day of January, 1939, he personally visited the premises located on the northeast corner of Fourth Avenue and Thirty-eighth Street, in the Borough of Brooklyn, County of Kings, City and State of New York, finding them to be lot 1 in Block 700 of Section 3, a plot of land measuring 20.2 feet, front and rear, and 100 feet deep on each side, improved with: (1) a two story brick building measuring about 26 feet by 20 feet containing a store and dwelling quarters above for one family, (2) a one story concrete block building used as a shop or garage measuring about 51 feet by 20 feet and (3) a one story brick garage

measuring about 12 feet by 20 feet and that, on information furnished him, he believes the gross annual rent at present of these premises to be about $1,200.

That, in his opinion, the fair market value, as of the date of his examination, was five thousand ($5,000) dollars for the land and six thousand ($6,000) dollars for the buildings or a total of eleven ($11,000) thousand dollars.

(Sworn to January 19, 1939.)

[fol. 36] CORRECTED AFFIDAVIT OF DONALD J. LYONS, IN SUPPORT OF DEFENDANT'S CROSS-MOTION

BOROUGH OF BROOKLYN,
County of Kings, ss:

DONALD J. LYONS, being duly sworn, deposes and says:

That he is a duly licensed Real Estate Broker in and for the State of New York.

That he resides at 533 Nostrand Avenue in the Borough of Brooklyn, County of Kings, City and State of New York.

That he has been actively engaged as a broker in the Real Estate business for the past twenty-five years and that he maintains an office for the practice of such business at 531 Nostrand Avenue in the Borough of Brooklyn, County of Kings, City and State of New York.

That he is thoroughly familiar with Real Estate values in the Borough of Brooklyn, County of Kings, City and State of New York, having acted as broker in many transactions involving the sale, rental and mortgaging of Real Estate, particularly in the vicinity of the corner of Fourth Avenue and Thirty-eighth Street of that Borough.

That on the eighteenth day of January, 1939, he personally visited the premises located on the northeast corner of Fourth Avenue and Thirty-eighth Street, in the Borough of Brooklyn, County of Kings, City and State of New York, finding them to be lot 1 in block 701 of Section 3, being known as by street number 975 Fourth Avenue, Brooklyn, New York, and being a plot of land measuring 25.2 feet, front and rear, and 100 feet deep on each side, improved [fol. 37] with: (1) a two story brick building measuring about 25 feet by 26 feet containing a store on the ground floor and dwelling quarters above for one family, (2) a one

story concrete block building used as a shop or garage measuring about 25 feet by 55 feet and (3) a one story brick garage measuring about 25 feet by 12 feet, and that, on information furnished him, he believes the gross annual rent at present of these premises to be about $1,200.

That, in the opinion of your deponent, the fair market value of the above described premises, as of the date of his examination, was Five thousand ($5,000) Dollars for the land and Six thousand ($6,000) Dollars for the buildings or a total of Eleven thousand ($11,000) Dollars.

(Sworn to January 20, 1939.)

IN SUPREME COURT OF NEW YORK

AFFIDAVIT OF FRANKLYN M. STONE, IN OPPOSITION TO DEFENDANT'S CROSS-MOTION

City, County and State of New York, ss:

FRANKLYN M. STONE, being duly sworn, deposes and says, that he is associated with the attorneys for the plaintiff in this action and has charge of this case.

This affidavit is submitted in opposition to the cross-motion made by the defendant, Hammond, to fix the value of the premises involved in this action for the purpose of a deficiency judgment.

[fol. 38] A memorandum of law is being submitted to the court, in behalf of the plaintiff, in which the plaintiff contends that upon the authorities cited therein this court is without power to grant the relief requested in the cross-motion. Without prejudice to that position and solely because the cross-movant has submitted an affidavit of one Lyons in which he expresses the opinion that the premises in question are worth $11,000, there is hereto annexed an affidavit made by Harold M. Mills, a real estate appraiser, in which he has appraised the value of the premises at $6,500.

Upon the argument of this motion before Mr. Justice May on January 23, 1939, the court stated that if it had power to go into the question of the value of the premises, it would be inclined to give great weight to the City's assessment of $15,000 where there was a conflict of expert opinion as to value. In this connection, the court's attention is called

to the fact that even Mr. Lyons, who has made an affidavit in behalf of the cross-movant, is $4,000 under the City's assessment and that Mr. Lyons merely expresses his opinion as to value without giving any factual basis therefor. In the annexed affidavit of Mr. Mills, however, the gross rentals are set forth and the actual expenses are also set forth, and the valuation expressed by Mr. Mills is based thereon.

In these times, deponent submits that a valuation having relation to the income of the property is more likely to represent the real value of the premises than a valuation such as is made by Mr. Lyons without regard to those factors or an appraisal made by the City of New York for the purposes of taxation. Furthermore, as is pointed out in the memorandum of law submitted in behalf of plaintiff, it is [fol. 39] universally accepted that property sold at foreclosure sales will yield less than property sold at private sales between willing buyers and willing sellers. Even if the court were to find a theoretical valuation somewhere between that fixed by Mr. Mills and Mr. Lyons, the price at which this property sold could not be deemed so inadequate as to shock the conscience of the court under the circumstances.

Deponent therefore submits, both as a matter of law and as a matter of fact, that the cross-motion should be denied and that the plaintiff's motion should be granted.

(Sworn to January 24, 1939.)

IN SUPREME COURT OF NEW YORK

AFFIDAVIT OF HAROLD M. MILLS, IN OPPOSITION TO DEFENDANT'S CROSS-MOTION

City, County and State of New York, ss:

HAROLD M. MILLS, being duly sworn, deposes and says:

For over nine years I have been employed by The National City Realty Corporation and have appraised a great variety of real property.

On January 23, 1939, I personally visited and inspected the property involved in this action which is located at the northeast corner of Fourth Avenue and 38th Street, Brook-

lyn, N. Y., for the purpose of appraising its value. The following facts enter into my appraisal.

The plot fronts 25′ 2″ on Fourth Avenue and has a depth of 100′. It is improved with three contiguous structures. [fol. 40] On the Fourth Avenue frontage there is a two story and cellar brick store and apartment building approximately 25′ 2″ in width by 27′ 6″ in depth. This building has a store on the ground floor and an apartment consisting of three rooms and bath on the second floor. There is a heating plant in the cellar which is not in use. To the rear of that building there is a one story cement block and frame garage type structure which is approximately 25′ 2″ in width and 58′ in length; and to the rear of the latter structure there is a one-story brick and frame one car garage which is approximately 14′ 6″ by 25′ 2″.

The store and the large garage structure to the rear rent for $75 per month. The small garage rents for $7 per month. Arrangements have just been made to rent the three room apartment for $10 per month. Hence, the gross rentals derived from the building are $1,104 per annum.

In appraising this property, however, I have estimated that it has a fair rental value, if fully rented, of $1,200 per annum. I have allowed only $100 per annum, less than 10%, for vacancies and loss of rent. This results in an estimated gross annual income of $1,100.

Expenses have been figured as follows:

Taxes	$441
Insurance	50
Water	20
Repairs, Supplies and Sundries	100
Salaries	—
Electricity	—
Fuel	—
	$611

[fol. 41] The annual net income is therefore estimated at approximately $500.

It is my opinion that for this property a capitalization rate of not less than 8% should be applied to the annual net income in determining its value. This would result in a valuation of $6,250.

After taking into consideration, among other things, the type of property, the location and immediate surroundings,

the present physical condition and occupancy, the transportation facilities, and the income and expenses, I have determined that the justifiable fair market value is $6,500.

I am aware that this property has been assessed for tax purposes at $15,000, but in my opinion this is an over assessment which cannot be justified upon any reasonable basis that comes to my mind. The real estate taxes paid, as a result of this high valuation, constitute 72% of the annual expenses and it is my opinion that said assessed value is an important factor in depressing the fair market value of this property to my estimate of $6,500.

The property is listed for sale with The National City Realty Corporation and can be purchased at the valuation which I have placed upon it.

(Sworn to January 24, 1939.)

IN SUPREME COURT OF NEW YORK, KINGS COUNTY

OPINION OF MR. JUSTICE MAY

Nat. City Bank of N. Y. v. Gelfert—Motion to confirm referee's report, etc., granted. Cross motion to fix value denied. (N. Y. L. J., February 1, 1939.)

[fol. 42] AFFIDAVIT OF NO OTHER OPINION

City, County and State of New York, ss:

CHARLES H. BUCKLEY, being duly sworn, deposes and says, that he is the attorney for the defendant-appellant herein, and is familiar with the facts and proceedings herein, that no opinion other than the foregoing opinion of Mr. Justice May was rendered by the Court below in making the order appealed from herein.

Charles H. Buckley.

Sworn to before me this 22nd day of April, 1939.
Lillian T. McManus, Notary Public, Kings County.

Kings Co. Clks. No. 37; Reg. No. 137.
N. Y. Co. Clks. No. 94; Reg. No. O-Mc-56.

Commission expires March 30, 1940.

[fols. 43-44] STIPULATION WAIVING CERTIFICATION

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the papers as hereinbefore printed, consist of true and correct copies of the notice of appeal, the order appealed from, and all the papers upon which the court below acted in making the order appealed from, and the whole thereof, now on file in the office of the Clerk of Kings County.

Certification thereof, in pursuance of said Section 170 is hereby waived.

Dated, New York, April 24th, 1939.

McKercher & Link, Attorneys for Defendant-Appellant. Zalkin & Cohen, Attorneys for Plaintiff-Respondent.

[fol. 45] IN SUPREME COURT OF NEW YORK, KINGS COUNTY

THE NATIONAL CITY BANK OF NEW YORK, Plaintiff,

against

JULIA C. GELFERT and GEORGE U. HAMMOND, as Executors under the Last Will and Testament of James J. Carpenter, Deceased; Marie V. Carpenter, Dorothy R. Carpenter, Vivian D. Carpenter, Morris Ances, Doing Business as Morris Auto Supplies, Mary Carpenter, Michaels Bros., Abraham & Straus, Inc., The People of the State of New York and The United States of America, Defendants

NOTICE OF APPEAL TO COURT OF APPEALS

SIRS:

Please take notice, that the above named plaintiff, The National City Bank of New York, hereby appeals to the Court of Appeals of the State of New York from so much of the judgment in the above entitled action, entered in the office of the Clerk of Kings County on the 1st day of September, 1939, which judgment was entered upon the order of the Appellate Division of the Supreme Court, Second Department, entered and filed in the office of the Clerk of said Appellate Division on July 7, 1939, and upon the remittitur filed on July 17, 1939 in the office of the Clerk of Kings

County, as modified the order entered herein on the 2nd day of February, 1939, by striking therefrom all of its directory provisions except the denial of the defendant's cross-motion and that part thereof which ratifies and confirms the [fol. 46] Referee's report of sale, omitting therefrom the reference to a deficiency judgment, and as vacated the judgment in the above entitled action entered pursuant to said order of February 2, 1939, in favor of the above named plaintiff against the defendants, Julia C. Gelfert and George U. Hammond, as Executors under the Last Will and Testament of James J. Carpenter, Deceased, and appeals as aforesaid from the said order of the Appellate Division entered on July 7, 1939.

Dated, New York, September 2nd, 1939.

Yours, &c., Zalkin & Cohen, Attorneys for Plaintiff, Office & P. O. Address, 19 Rector Street, Borough of Manhattan, City of New York.

To: Clerk of the County of Kings, County Courthouse, Brooklyn, New York. McKercher & Link, Esqs., Attorneys for Defendant, George U. Hammond, etc., 17 John Street, New York, N. Y.

[fol. 47] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

THE NATIONAL CITY BANK OF NEW YORK, Respondent,

against

JULIA C. GELFERT, et al., Defendants; GEORGE U. HAMMOND, as Executor under the Last Will and Testament of James J. Carpenter, Deceased, Appellant

ORDER MODIFYING AND AFFIRMING, AS MODIFIED, THE ORDER APPEALED FROM AND VACATING THE JUDGMENT APPEALED FROM—July 7, 1939

The above named George U. Hammond, as Executor under the Last Will and Testament of James J. Carpenter, deceased, a defendant in this action having appealed to the Appellate Division of the Supreme Court from an order of the Supreme Court entered in the office of the Clerk of the County of Kings on the 2nd day of February, 1939, grant-[fol. 48] ing plaintiff's motion to confirm the referee's re-

port of sale, denying defendant's cross-motion to fix the real value of the premises foreclosed, and directing that a deficiency judgment be docketed, and from the judgment docketed pursuant to said order herein, and the said appeal having been argued by Mr. Charles H. Buckley of Counsel for the appellant, and argued by Mr. B. B. Fensterstock of Counsel for the respondent, and due deliberation having been had thereon,

It is Ordered that the order so appealed from be and the same hereby is modified by striking therefrom all of its directory provisions except the denial of the defendant's cross-motion and that part thereof which ratifies and confirms the referee's report of sale, omitting therefrom however, the reference to a deficiency, and as so modified unanimously affirmed, without costs, and it is

Further Ordered that the judgment entered pursuant to said order be and the same hereby is vacated.

Enter.

E. L., P. J.

[fol. 49] JUDGMENT ENTERED ON ORDER OF APPELLATE DIVISION

No. 11240

Against Whom Obtained	In Whose Favor
Julia C. Gelfert 825 E. 13 St., George U. Hammond 129 Pearl St., N. Y. C. as Executors of the Estate of James J. Carpenter	National City Bank of New York 55 Wall St., N. Y. C.

Where Perfected	When Perfected	H. M.	Amount Damages and Costs	Attorney	When
Supreme Court Kings County	Feb. 4 1939	10:20	Def. 16,162.12 & Int. from 12/22/38	Zalkin & Cohen	Judgment vacated, see Order & Remit. Filed Sep. 1, 1939.

County Clerk's Office,
County of Kings, ss:

I, John N. Harman, Clerk of the County of Kings, certify that the above is a true and correct transcript from the Docket of Judgments kept in my office, and I also certify that the above Judgment is Vacated as above stated.

In Testimony Whereof, I have hereunto set my name and affixed my official seal this day of Oct. 4, 1939.

John N. Harman, Clerk. (Seal.)

[fol. 50] In New York Supreme Court, Appellate Division, Second Department

Lazansky, P. J.; Hagarty, Johnston, Adel and Close, JJ.

The National City Bank of New York, Respondent,

against

Julia C. Gelfert, et al., Defendants; George U. Hammond, as Executor under the Last Will and Testament of James J. Carpenter, Defendant-Appellant

Appeal by George U. Hammond, as one of the Executors, etc., from an order entered in the office of the Clerk of the County of Kings on the 2nd day of February, 1939, confirming the referee's report of sale, denying appellant's cross-motion for an order fixing the value of the premises foreclosed and directing that a deficiency judgment be docketed; and from the judgment entered in said Clerk's office on the 4th day of February, 1939, pursuant to said order.

Charles H. Buckley (George Link, Jr., with him on the brief), for the Appellant.

Barney B. Fensterstock (Israel Akselrod and Theodore B. Wolf with him on the brief), for the Respondent.

Opinion

Per Curiam:

Appeal from order and judgment in a foreclosure action. [fol. 51] Order modified by striking therefrom all of its directory provisions and by providing in lieu thereof that

plaintiff's motion be granted to the extent of confirming the referee's report of sale except as to deficiency and otherwise denied, and that the cross-motion of the defendant-executor be denied, and, as so modified, the order is unanimously affirmed, without costs. Judgment entered pursuant to said order vacated. Plaintiff did not make an application for a deficiency judgment, as provided by Section 1083 of the Civil Practice Act. Said defendant's cross-motion for an order fixing the value of the premises in order to determine the amount of deficiency, if any, was properly denied, because by it said defendant really sought a modification of the judgment of foreclosure and sale. Lazansky, P. J., Johnston and Adel, JJ., concur. Hagarty, J., concurs in result, with opinion. Close, J., concurs with Hagarty, J.

HAGARTY, J. (concurring):

I concur in result.

In accordance with a judgment of foreclosure and sale of mortgaged premises situate in the County of Kings, adjudicating that there was due to plaintiff the sum of $18,401.25, the property was sold to the plaintiff on the 16th day of December, 1938, for the sum of $4,000, leaving a deficiency, after inclusion of interest and expenses, of $16,162.12. In opposition to a motion to confirm the referee's report of sale and for a deficiency judgment, and by way of cross-motion, the appellant sought an order fixing the value of the premises so foreclosed "for the purposes of deficiency judgment proceedings", upon the general ground that it would be inequitable and unconscionable to permit plaintiff to have a deficiency judgment other than [fol. 52] one measured by the value of the premises. Were it not for the application of Section 1083 of the Civil Practice Act, as amended in 1938 (Laws of 1938, Chap. 510 in effect April 7, 1938), which appellant invokes on this appeal, an affirmance of the order under review would be required under the recent rulings by the Court of Appeals. Prior to the enactment of this amendment, the right to a deficiency judgment was the creation of statute (New York Life Ins. Co. v. Guttag Corp., 265 N. Y. 292, 296), pursuant to which a deficiency judgment followed as an incident to the final judgment of foreclosure and sale (Feiber Realty Corp. v. Abel, 265 N. Y. 94), and a court of equity was without power to withhold such deficiency judgment (Emi-

grant Industrial Sav. Bank v. Van Bokkelen, 269 N. Y. 110) or to vacate the final judgment of foreclosure and sale on a showing that inequity or hardship, resulting from general economic conditions, would follow the entry of such deficiency judgment. (Guaranteed Title & Mort. Co. v. Scheffres, 275 N. Y. 30, overruling Monaghan v. May, 242 App. Div. 64, and Guaranteed Title & Mortgage Co. v. Scheffres, 247 App. Div. 294.)

The facts here presented did not warrant the setting aside of the sale on the ground that the price obtained was shockingly inadequate. (See Emigrant Industrial Sav. Bank v. Van Bokkelen, supra, p. 115; Housman v. Wright, 50 App. Div. 606.) Though plaintiff purchased the property for the sum of $4,000, plaintiff's real estate expert appraised it at the sum of $6,500, at which price plaintiff now offers the property for sale. Although claiming its value to be much greater, appellant offers no specific hope that substantially more than $4,000 would be obtained on a resale.

[fol. 53] Section 1083 of the Civil Practice Act, as amended, requires one seeking a deficiency judgment after foreclosure and sale to make application therefor within a specified time, and limits the amount of such judgment in accordance with a determination of the market value of the property. Thus, in effect, the standard to be applied in determining the amount of deficiency judgments which was set up in the emergency legislation (§ 1083-a, Civ. Prac. Act) has been permanently adopted.

It is conceded that the mortgage here involved, made on the 29th day of December, 1932, is not within the purview of Section 1083-a, Civil Practice Act. It is apparent, however, that Section 1083, as amended, is applicable, inasmuch as that statute relates to "all cases where the sale is held after the date this section as hereby amended takes effect".

Respondent contends that the amended section, in so far as it purports to affect the right to a deficiency judgment for the whole of the residue, is unconstitutional as violative of the due process clause of the Constitution of this State.

The constitutionality of the emergency legislation, of which this amendment is a counterpart, namely, Section 1083-a, Civil Practice Act, has been upheld, although not without indication that the determination was predicated upon the principle that its constitutionality was dependent upon the exercise of police power to cope with an emergency, Klinke v. Samuels, 264 N. Y. 144; New York Life

Ins. Co. v. Guttag Corp., 265 N. Y. 292. That ground was not invoked, however, by the United States Supreme Court in holding that the emergency statute was not violative of the contract clause of the Federal Constitution. In Honey- [fol. 54] man v. Jacobs (— U. S. —, decided April 17, 1939), Chief Justice Hughes writes:

"The contract contemplated that the mortgagee should make himself whole, if necessary, out of the security but not that he should be enriched at the expense of the debtor or realize more than what would repay the debt with the costs and expenses of the suit. Having a total debt of $15,771.17, with expenses, etc., of $1319.03, appellant has obtained through his foreclosure suit the property of the debtor found without question to be worth over $25,000. He has that in hand. We know of no principle which entitles him to receive anything more. Assuming that the statute before its amendment permitted a recovery of an additional amount through a so-called deficiency judgment, we cannot say that there was any constitutional sanction for such a provision which precluded the legislature from changing it so as to confine the creditor to securing the satisfaction of his entire debt. Section 1083-a in substance assured to the court the exercise of its appropriate equitable powers. By the normal exercise of these powers, a court of equity in a foreclosure suit would have full authority to fix the terms and time of the foreclosure sale and to refuse to confirm sales upon equitable grounds where they were found to be unfair or the price bid was inadequate. Home Building & Loan Association v. Blaisdell, supra (290 U. S. 398), at pp. 446, 447, and cased cited, note 13. Richmond Mortgage Corpo- [fol. 55] ration v. Wachovia Bank, supra (300 U. S. 124), at p. 129. In this control over the foreclosure sale under its decree, the court could consider and determine the value of the property sold to the mortgagee and what the mortgagee would thus realize upon the mortgage debt if the sale were confirmed. See Monaghan v. May, 242 App. Div. N. Y. 64, 67; Guaranteed Title & Mortgage Co. v. Scheffres, 247 App. Div. N. Y. 294."

In discussing a statute of North Carolina considered by the United States Supreme Court in Richmond Corp. v. Wachovia Bank (300 U. S. 124), the Chief Justice further writes:

"The act recognized the obligation of his contract and his right to its full enforcement but limited that right 'so as to prevent his obtaining more than his due. By the old and well known remedy of foreclosure, a mortgagee was so limited because of the chancellor's control of the proceeding'. That 'classical method' of realization upon a mortgage security through a foreclosure suit had always been understood 'to be fair to both parties to the contract and to afford an adequate remedy to the mortgagee'. In that view it appeared that the new law as to proceedings for a deficiency judgment after the exercise of a power of sale 'merely restricted the exercise of the contractual remedy to provide a procedure which, to some extent, renders the remedy by a trustee's sale consistent with that in equity'."

[fol. 56] Although this reasoning would apply as forcefully to Section 1083 as amended, we are concerned, of course, with the question of the constitutionality of that statute in the light of our State Constitution.

As this mortgage was made prior to the enactment of the amended section, respondent invokes the doctrine that laws in effect at the time and place of the making of the contract enter into and form part of the contract as fully as if they had been expressly referred to or incorporated in its terms. (Farmers Bank v. Fed. Reserve Bank, 262 U. S. 649, 650.) On the other hand, appellant points to the equally well founded principle that, at the time of the making of a contract, the parties thereto are chargeable with knowledge of the existence of the power of the State to modify remedies for enforcement of contract obligations. (Preston Co. v. Funkhouser, 261 N. Y. 140, affd. 290 U. S. 163, 168.) It is, therefore, competent for a state to change the form of a remedy provided no substantial right secured by contract is thereby impaired. (Home Bldg. & L. Assn. v. Blaisdell, 290 U. S. 398, 430.) "In all such cases the question becomes, therefore, one of reasonableness, and of that the legislature is primarily the judge." (Antoni v. Greenhow, 107 U. S. 769, 773.)

The respondent presents an impressive argument in support of its contention that the amended section works a substantial deprivation of its theretofore existing right to a deficiency judgment, based simply upon arithmetical computation of the difference between the amount due and that realized upon the sale. In addition, at the time of the mak-

ing of the mortgage there was no obligation, express or [fol. 57] implied, imposed upon the mortgagee to bid in the pledged property upon foreclosure. With a deficiency judgment dependent upon market value, however, the mortgagee must reconcile himself to payment in land rather than in money, if he forecloses his lien. He must bid in the property at its market value or suffer the loss of a deficiency judgment for the difference between such value and the amount bid by another.

While due appreciation must be accorded the forcefulness of the above and kindred contentions with respect to the substance of rights of which a mortgagee is deprived by virtue of the amended section, it must be borne in mind that dual remedies are afforded a creditor whose indebtedness is secured by mortgage. He may sue for the debt in personam, irrespective of the pledge, and procure a money judgment in entirety, or he may foreclose his lien. In invoking the latter remedy he brings himself within the jurisdiction of equity which, in the exercise of its inherent power, would grant a deficiency judgment only if satisfied that the circumstances warranted such award in accordance with the dictates of fairness and justice, which would exclude a mortgagee who had obtained real property of a value equivalent to the indebtedness. (Honeyman v. Jacobs, supra; Home Bldg. & L. Assn. v. Blaisdell, supra, pp. 446, 447; Monaghan v. May, 242 App. Div. 34; Guaranteed Title & Mortgage Co. v. Scheffres, 247 App. Div. 294; Federal Title &c. Guaranty Co. v. Lowenstein, 113 N. J. Eq. 200.) But in this State, that natural and ancient attribute of chancery was superseded by statute awarding deficiency judgment as a matter of course. (Feibar Realty Corp. v. Abel, supra; Emigrant Industrial Sav. Bank v. Van Bokkelan, supra; Guaranteed Title & Mortgage Co. v. Scheffres, [fol. 58] supra.) The effect of the amended section is to dispense with that requirement, to a prescribed extent, and to recognize in equity a power normally exercised by that court. Of such inherent power a mortgagee must be deemed to have been aware at the time of entering into his contract. It was within the power of the Legislature, in my opinion, to set up market value of property as the basis upon which deficiency judgments should be granted, and that thereby there was no impairment of any substantial right in the mortgagee. Such legislation safeguards the indebtedness of the mortgagee by providing for real property and a

money judgment in a combined value equivalent thereto, although it has the effect of stimulating the mortgagee into activity in according justice to the mortgagor as well as to himself. The amended section, as affecting the remedy of the respondent, is constitutional.

Although in its cross-motion the appellant did not invoke the amended section, the fact remains that respondent made no application for a deficiency judgment in accordance with the provisions of the section. On the contrary, and in support of its motion as made for judgment as a matter of course, the respondent's affidavit avers that the amended section is inapplicable. Thus there has never been an application by respondent, in accordance with law, for the deficiency judgment which it seeks.

Close, J., concurs.

[fol. 59] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 60] IN COURT OF APPEALS OF NEW YORK

Pleas in the Court of Appeals held at Court of Appeals Hall in the City of Albany, on 8th day of October in the year of our Lord one thousand nine hundred and forty before the Judges of said Court:

Witness,
The Hon. Irving Lehman, Chief Judge, Presiding.
John Ludden, Clerk.

REMITTITUR—October 9, 1940

THE NATIONAL CITY BANK OF NEW YORK, Appellant,

ag'st

KULIA C. GEOFERT, as exrs. etc. & ors. Impl'd with GEORGE U. HAMMOND, as Exr. etc. of James J. Carpenter, Dec'd., Respondent

Be It Remembered, That on the 16th day of February in the year of our Lord one thousand nine hundred and forty The National City Bank of New York the appellant in this cause, came here unto the Court of Appeals by Zalkin & Cohen, its attorneys, and filed in the said Court a Notice of

Appeal and return thereto from the judgment and order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And George U. Hammond as executor etc. of James J. Carpenter the respondent in said cause, afterwards appeared in said Court of Appeals by McKercher & Link, his attorneys.

Which said Notice of Appeals and the return thereto filed as aforesaid are hereunto annexed.

Whereupon the said Court of Appeals having heard this cause argued by Mr. B. B. Fensterstock of counsel for the appellant and submitted by counsel for the respondent, and [fol. 61] after due deliberation had thereon did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and that of Special Term affirmed and its judgment reinstated without costs,

And it was also further ordered that the records aforesaid, and the proceedings in this court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order of the Appellate Division be reversed and that of Special Term affirmed and its judgment reinstated without costs, as aforesaid,

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the justices thereof, according to the form of the statute in such cases made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the justices thereof, etc.

John Ludden, Clerk of the Court of Appeals of the State of New York.

[fol. 62] In Supreme Court of New York, Kings County
(Special Term—Part II)

6996/1938

The National City Bank of New York, Plaintiff,

against

Julia C. Gelfert and George U. Hammond, as Executors under the Last Will and Testament of James J. Carpenter, Deceased, Marie V. Carpenter, Dorothy R. Carpenter, Vivian D. Carpenter, Morris Ances, Doing Business as Morris Auto Supplies, Mary Carpenter, Michaels Bros., Abraham & Straus, Inc., the People of the State of New York and the United States of America, Defendants

Order on Remittitur—November 1, 1940

The above-named plaintiff appealed to the Court of Appeals of the State of New York from an order of the Appellate Division of the Supreme Court, Second Department, modifying an order of Special Term, Part II of the Supreme Court of the State of New York, County of Kings, dated February 2, 1939, which order granted plaintiff's motion to confirm report of the referee to sell and directed the entry of a deficiency judgment in the sum of $16,162.12 against the defendants Julia C. Gelfert and George U. Hammond, as executors under the Last Will and Testament of James J. Carpenter, Deceased, upon which order judgment in the sum of $16,162.12 was entered in the office of the Clerk of the County of Kings on February 4, 1939, and from each and every part of said order, as well as from the whole thereof; and the said appeal having been duly argued at [fol. 63] the said Court of Appeals, and, after due deliberation, the Court of Appeals having ordered and adjudged that the order of the Appellate Division of the Supreme Court, Second Department, appealed from as aforesaid, be reversed and that of the Special Term affirmed and its judgment reinstated without costs and having ordered and adjudged that the proceedings therein be remitted to this Supreme Court, there to be proceeded upon according to law,

Now, on reading and filing the remittitur from the said Court of Appeals herein, and upon motion of Zalkin & Cohen, attorneys for the plaintiff herein, it is hereby

Ordered that the order and judgment of the said Court of Appeals be and the same hereby is made the order and judgment of this court;

Enter,

J. T. H., J. S. C.

Granted Nov. 1, 1940. Francis J. Sinnott.

[fol. 64]

IN SUPREME COURT OF NEW YORK, KINGS COUNTY

[Title omitted]

ORDER AMENDING TITLE OF ACTION—December 23, 1940

Julia C. Gelfert as the sole surviving Executor of the Last Will and Testament of James J. Carpenter, deceased, having moved this Court for an order to properly reflect the death of George U. Hammond, one of the Executors of said Estate; and on reading the final notice of motion dated November 29, 1940, the affidavit of Julia C. Gelfert sworn to the 28th day of November, 1940, together with proof of due service thereof and on all the proceedings heretofore had herein in support of said motion; and the affidavit of Barney B. Fensterstock sworn to December 4, 1940 in opposition thereto; McKercher & Link by Charles H. Buckley of Counsel appearing in support of said motion and Zalkin & Cohen by Barney B. Fensterstock, Esq. of Counsel in opposition thereto; and due deliberation having been had thereon.

Now, upon motion of McKercher & Link, attorneys for [fol. 65] said Julia C. Gelfert as such sole surviving Executor, it is

Ordered that said motion be and the same hereby is granted to the extent of amending the title of this action and the proceedings herein to read as follows:

"Supreme Court, Kings County

The National City Bank of New York, Plaintiff,

against

Julia C. Gelfert as sole surviving Executor of the Last Will and Testament of James J. Carpenter, deceased, Vivian D. Carpenter, Marie V. Carpenter, Dorothy R. Carpenter, Morris Ances, Doing Business as Morris Auto Supplies, Mary Carpenter, Michaels Bros., Agraham & Straus, Inc., the People of the State of New York and the United States of America, Defendants."

Enter.

Cuff, J. S. C.

Granted Dec. 23, 1940. Francis J. Sinnott, Clerk.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 66] Supreme Court of the United States

[Title omitted]

Order Extending Time within which to File Petition for Certiorari

Upon Consideration of the application of counsel for the Petitioner,

It Is Ordered that the time within which to file petition for certiorari in the above entitled cause be, and the same hereby is, extended to, and including, February 7, 1941.

Harlan F. Stone, Associate Justice of the Supreme Court of the United States.

Dated this 3rd day of January, 1941.

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[fol. 67] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 3, 1941

The petition herein for a writ of certiorari to the Supreme Court of the State of New York is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3363)

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FILE COPY

No. 740

Office - Supreme Court, U. S.
FILED
FEB 1 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940

JULIA C. GELFERT, as sole Surviving Executor of the Last Will and Testament of JAMES J. CARPENTER, deceased,

Petitioner,

against

NATIONAL CITY BANK OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

GEORGE LINK, jr.,
Attorney for Petitioner,
Office & Post Office Address,
17 John Street,
New York City, N. Y.

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Supreme Court of the United States

OCTOBER TERM, 1940

JULIA C. GELFERT, as sole Surviving Executor of the Last Will and Testament of JAMES J. CARPENTER, deceased,
Petitioner,

against

NATIONAL CITY BANK OF NEW YORK,
Respondent.

PETITION FOR WRIT OF CERTIORARI

This Court by order (R. 41) dated January 3, 1941 extended the time of petitioner to February 7, 1941 within which to apply to this Court for a writ of certiorari, from the order and judgment of the Court of Appeals of the State of New York, dated October 8, 1941, which order was made the order and judgment of the Supreme Court of the State of New York, County of Kings by order dated and entered November 1, 1940 (R. 39).

The original opinion of the Court of Appeals of the State of New York is reported at 284 N. Y. 13, 29 N. E. 2d 449 and is set forth in Appendix A. The opinion of the Appellate Division of the Supreme Court, Second Department, which said opinion of the said Court of Appeals reversed, was reported in 257 App. Div., 465, 13 N. Y. S. 2d 600 (see R. 31-37).

Question Presented

Prior to April 7, 1938, Section 1083 of the Civil Practice Act of the State of New York permitted the entry of a deficiency judgment in actions to foreclose mortgages on real property as a matter of course based upon the difference between the amount of the judgment and the sale price thereof as found by the Referee authorized to sell the real estate.

On April 7, 1938 the New York State Legislature, by Chapter 510 of the Laws of 1938, amended said Section 1083 of said Civil Practice Act (Appendix B) to provide that no deficiency judgment should be entered without application to the Court. That upon said application the Court should determine the fair and reasonable value of the mortgaged premises as of the date such premises were bid in at the sale. That the Court should direct the entry of a deficiency judgment based upon the difference between the value so found by the Court, and the amount contained in the judgment of foreclosure and sale.

The amendment did not affect the mortgagee's right to foreclose.

The Appellate Division (R. 31-37) held that the amendment to Section 1083 of said Civil Practice Act was constitutional. That no deficiency judgment could be entered in an action to foreclose a mortgage on real property unless the provisions of said Section 1083 had been complied with. Concededly the National City Bank of New York, the plaintiff in the foreclosure action, had not complied with said amendment but had entered a deficiency judgment as of course.

The Court of Appeals (Appendix A) reversed the Appellate Division, and held that said amendment to Section 1083 of the New York Civil Practice Act was unconstitutional as to mortgages executed prior to the amendment, on the ground that the amendment transcends the scope of the normal control of judicial remedies which the contracts clause of the Federal constitution has left to the states. *National City Bank of New York* v. *Gelfert,* 284 N. Y. at page 17.

The question here presented is, whether Chapter 510 of the Laws of 1938 which amended Section 1083 of the New York Civil Practice Act is constitutional under the Federal constitution when applied to mortgages executed prior to the effective date of said amendment to wit: April 7, 1938.

Summary Statement of the Matter Involved

The National City Bank of New York hereinafter referred to as "Bank" instituted an action to foreclose a mortgage executed and delivered by James J. Carpenter on the 29th day of December, 1932 covering certain real property in the County of Kings, City and State of New York (R. 7-8, 25-27). Thereafter said Bank instituted an action to foreclose said mortgage, naming the executors of the Last Will and Testament of said James J. Carpenter as parties defendants (R. 5). The estate of said James J. Carpenter will hereafter be referred to as "Petitioner". A judgment of foreclosure and sale was entered and the property sold pursuant thereto at public auction on the 16th day of December, 1938, for the sum of $4,000 to Bank's nominee (R. 8, 27). The Referee appointed by the Court to sell, reported a deficiency of $16,162.12 based upon the difference between the amount of the mortgage, interest, costs, etc. and the said sale price (R. 12). Said Bank thereupon made a motion to confirm said Referee's report of sale, demanding that a deficiency judgment be entered against the executors of the said estate for the sum of $16,162.12 as of course (R. 5-19).

Petitioner filed objections to the Referee's report of sale and also made a cross motion to have the Court fix the value of the premises foreclosed for the purpose of determining the amount of any deficiency judgment. Petitioner did not attack the confirmation of the sale of said property (R. 18).

The Supreme Court of the State of New York, Kings County, denied the cross motion of Petitioner and granted the motion of the Bank to confirm the Referee's report, and also directed the entry of a deficiency judgment against the said estate for said sum of $16,162.12 (R. 3-4, 27).

Petitioner appealed to the Appellate Division of said Supreme Court, Second Department (R. 2-3), and the said

Appellate Division reversed the order of the said Supreme Court by modifying the same and striking out the deficiency (R. 2-3). The said Appellate Division also held that the Bank had not complied with said Section 1083 of said Civil Practice Act and therefore no deficiency judgment could be entered (R. 29-37).

The Court of Appeals as above stated reversed the order of the Appellate Division and reinstated the deficiency judgment, on the ground that said Chapter 510 of the Laws of 1938 cannot be constitutionally applied to mortgage contracts previously made, and that as to such contracts the former Section 1083 is in force and effect (R. 37-38). *National City Bank* v. *Gelfert,* 284 N. Y., at page 23. Mr. Judge Lewis dissented from the majority opinion (Opinion—Appendix A).

Reasons for Granting Writ

1. The Court of Appeals of the State of New York has held unconstitutional Chapter 510 of the New York Laws of 1938, insofar as it applies to real property mortgaged prior to April 7, 1938. The statute which has been so held unconstitutional is remedial. It provides an equitable method of arriving at and determining deficiency judgments in foreclosure actions.

2. The decision of the Court of Appeals which this application seeks to review, and the judgment of the Supreme Court of New York, County of Kings, entered thereon appear to be contrary to the decision of this Court in *Richmond Mortgage and Loan Corporation* v. *Wachovia Bank and Trust Company,* 300 U. S. 124, 57 S. Ct. 338.

3. The statute so held unconstitutional by said Court of Appeals is of immediate public importance in that it affects every owner of New York State real property, who mortgaged his premises during the period July 1, 1932 and April 7, 1938.

The decision has aroused great public interest as it destroys the protection which in equity the mortgagor should have and which many of them did have until the Court of Appeals reversed the lower court.

Statutes Involved

Section 1083 of the New York Civil Practice Act prior to the 1938 amendment and Chapter 510 of the New York Laws of 1938 which amended said Section 1083 are hereinafter set forth in Appendix B.

WHEREFORE your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of New York, County of Kings, and the Court of Appeals of the State of New York commanding the court to certify and submit to this Court for review and examination, on a date to be therein named, a full and complete transcript of the record and the proceedings in the case entitled "Supreme Court of the State of New York, Kings County", *"National City Bank of New York,* plaintiff *v. Julia C. Gelfert,* as sole surviving Executor of the Last Will and Testament of James J. Carpenter, deceased, et al., defendants."

That said judgment of the Supreme Court of the State of New York, County of Kings, and the said Court of Appeals be reversed by this Honorable Court, and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem just and proper and your petitioner will ever pray.

GEORGE LINK, jr.,
Attorney for Petitioner,
Office & Post Office Address,
17 John Street,
New York City, N. Y.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions Below:

The first opinion of the Supreme Court of the State of New York, County of Kings, appears at page 27 of the transcript, and the order of said Court appears at pages 3 and 4 of the said transcript. The opinion of the Appellate Division of the Supreme Court of the State of New York, Second Department, appears at pages 31-37 of the transcript. The opinion of the Court of Appeals of the State of New York is reported in 284 N. Y. 13, 29 N. E. 2d 449 and is set forth in full in Appendix A.

Jurisdiction

The jurisdiction of this court is invoked under Section 237 of the Judicial Code as amended and Section 350 of the Title 28 U. S. C. A.

This court granted certiorari to review a Wisconsin taxing statute which had been declared unconstitutional by the Supreme Court of the State of Wisconsin. *State of Wisconsin* v. *J. C. Penny Co.*, 61 S. Ct. 246.

Facts

The National City Bank of New York herein referred to as "Bank" moved to confirm the report of the Referee appointed to sell the real property of James J. Carpenter, deceased, covered by the mortgage sought to be foreclosed, which premises were sold pursuant to a judgment of foreclosure and sale dated November 15, 1938. The premises were sold at the foreclosure sale for $4,000. The Referee reported a deficiency of $16,162.12 (R. 5-18).

The property foreclosed is located in the Borough of Brooklyn, County of Kings, on the north side of 38th

Street and the easterly side of Fourth Avenue, measuring 25 ft. 2 in. on Fourth Avenue, and 100 feet on 38th Street (R. 23-24).

Petitioner filed objections to the said Referee's report as follows (R. 18):

1. That the price at which said property was sold was wholly inadequate, unconscionable and inequitable.

2. That the sale price was so low as not to be a sale within the meaning of the Civil Practice Act.

3. That no deficiency judgment should be permitted to be entered.

By way of cross motion Petitioner moved for an order fixing a value for the premises foreclosed, as of the date of the foreclosure sale (R. 19-24). The foreclosed premises were assessed by the City of New York for tax purposes at $15,000 (R. 20, 24), improved by certain buildings thereon and the total rental value was in excess of $1200 per year (R. 21). An independent appraiser appraised the property at $11,000 (R. 23-24).

As heretofore stated the Supreme Court of the State of New York, County of Kings, overruled Petitioner's objections and denied Petitioner's motion to fix the value of the real property and directed entry of a deficiency judgment in the sum of $16,162.12, which judgment was reversed by said Appellate Division, and the Appellate Division thereafter was reversed by said Court of Appeals thereby reinstating the said deficiency judgment.

The Law

The applicable provisions of the statutes are set out in full, Appendix B hereof, on pages 32 and 33. Said Sections are Section 1083, as it existed prior to April 7, 1938 and Section 1083 as amended by Chapter 510 of the New York Laws of 1938, of the Civil Practice Act of the State of New York.

Specifications of Error

Petitioner makes the following assignments of error:

1. The Court of Appeals of the State of New York and the Supreme Court of the State of New York, County of Kings, erred in holding that said Chapter 510 of the New York Laws of 1938 is unconstitutional insofar as it applies to mortgages executed prior to the effective date thereof, to wit, April 7, 1938.

ARGUMENT

Section 1083 of the Civil Practice Act as amended by Chapter 510 of the New York Laws of 1938 is constitutional as applied to mortgages executed prior to its effective date.

The Court of Appeals of the State of New York in its decision below,—*National City Bank of New York* v. *Gelfert*, 284 N. Y. 13, reviewed the law of the State of New York with respect to entering deficiency judgments in foreclosure actions. It stated at page 17 "On that basis, the question to be determined is whether the new Section 1083 transcends the scope of the normal control over judicial remedies which the contracts clause of the Federal Constitution has left to the States."

The said Court of Appeals reversed the decision of the Appellate Division which it was reviewing and stated at page 23, "In short, our conclusion is that Section 1083 of the Civil Practice Act as amended by Chapter 510 of the Laws of 1938, cannot be constitutionally applied to mortgage contracts previously made and that as to such contracts the former Section 1083 is in force and effect."

One of the reasons given by said Court of Appeals was, at page 21, that the system of foreclosure has been markedly changed by the "new Section 1083". In discussing this question the Court stated at page 21,

"These substantial alterations of the former statutory status of mortgagees are not to be temporary. They are not conditioned upon any equitable factor and leave no room for the play of any equitable consideration. They benefit every mortgagor irrespective of the character or amount of his investment and they burden every mortgagee no matter what his necessities. They reach indeed to all situations where for any reason whatever the price paid by any purchaser on a valid foreclosure sale falls short of the market value of the property as subsequently determined by the court."

In stating that the statute is not conditioned upon any equitable factor, and leaves no room for the play of any equitable consideration the said Court of Appeals did not give full consideration to the specific words of the amendment here in question. The statute directs that the Court shall determine "the fair and reasonable market value of the mortgaged premises."

What could be clearer than this wording of the statute to bring into play all of the equitable considerations which should be considered by the Courts in determining deficiencies, and to do the very thing which the Courts of the State of New York have been trying to do during the depression. See *Monaghan* v. *May*, 242 App. Div. 64. Overruled by the said Court of Appeals—*Guaranteed Title and Mortgage Co.* v. *Scheffres*, 275 N. Y. 30. This Court cited *Monaghan* v. *May* with approval in *Honeyman* v. *Jacobs*, 59 S. Ct. 702.

This Court in *Richmond Mortgage and Loan Corp.* v. *Wachovia Bank and Trust Company*, 300 U. S. 124, upheld a statute of the State of North Carolina, which in effect is the same as the statute here held unconstitutional. The procedure in North Carolina is by two separate actions wherein the North Carolina statute left to the jury the question of determining the actual value needed by the mortgagee to make him whole by finding the true or fair

value of the property at the date of sale. The common law remedy is still available in New York—dissenting opinion of Lewis, J. below, 284 N. Y. at page 27.

The New York statute accomplishes exactly the same result as the North Carolina statute. There is no real difference in these laws. The Court of Appeals in its decision below discusses this case but disposes of it by stating that the North Carolina statute affects only foreclosures under power of sale, and does not apply to foreclosure sales made pursuant to an order or decree of the Court.

This summary disposal of the principle involved was erroneous as this court in its decision 300 U. S. at page 130 stated:

> "* * * The act alters and modifies one of the existing remedies for realization of the value of the security, but cannot fairly be said to do more than restrict the mortgagee to that for which he contracted, namely, payment in full. It recognizes the obligation of his contract and his right to its full enforcement but limits that right so as to prevent his obtaining more than his due."

At page 131:

> "* * * The law has merely restricted the exercise of the contractual remedy to provide a procedure which to some extent renders the remedy by a trustee's sale consistent with that in equity. This does not impair the obligation of the contract."

This Court in upholding the constitutionality of the New York Mortgage Moratorium Legislation with respect to deficiency judgments in New York foreclosure actions of Mortgages executed prior to July 1, 1932 upheld the same not because it was emergency legislation, but upon the ground that there was no constitutional sanction for a statute which would preclude the legislature from changing it so as

to confine the creditor to securing the satisfaction of his entire debt. *Honeyman* v. *Jacobs,* 59 S. C. 702, 703. This Court in *Honeyman* v. *Jacobs,* stated:

> "Section 1083A in substance assured to the court the exercise of its appropriate equitable powers. By the normal exercise of these powers, a court of equity in a foreclosure suit would have full authority to fix the terms and time of the foreclosure sale and to refuse to confirm sales upon equitable grounds where they were found to be unfair or the price bid was inadequate. Home Building & Loan Association v. Blaisdell, supra, 290 U. S. (398) at pages 446, 447 and cases cited, note 18, 54 S. Ct. (231) at page 243, 78 L. Ed. 413 (88 A. L. R. 1481), Richmond Mortgage Corporation v. Wachovia Bank, supra, 300 U. S. (124) at page 129, 57 S. Ct. (338) at page 339, 81 L. Ed. 552, 108 A. L. R. 886. In this control over the foreclosure sale, the court could consider and determine the value of the property sold to the mortgagee and what the mortgagee would realize upon the mortgage debt if the sale were confirmed. See Monaghan v. May, 242 App. Div. 64, 67, 273 N. Y. S. 475; Guaranteed Title & Mortgage Co. v. Scheffres, 247 App. Div. 294, 285 N. Y. S. 464."

The Appellate Division of the Supreme Court in upholding the constitutionality of said Section 1083 as so amended by Chapter 510 of the laws of 1938 in 257 App. Div. 465, put its decision squarely upon the following cases:

Richmond Loan & Mortgage Corporation v. *Wachovia Bank & Trust Company,* 300 U. S. 124;

Honeyman v. *Jacobs,* 59 S. Ct. 702;

J. B. Preston Co. v. *Funkhouser,* 261 N. Y. 140, affirmed 290 U. S. 163;

Home Building and Loan Assoc. v. *Blaisdell,* 290 U. S. 398.

The facts in the present case show the necessity of the legislation here in question. The property foreclosed was assessed by the City of New York for $15,000 (R. 24). It was conservatively appraised by an independent appraiser for $11,000 (R. 23, 24), and it was purchased at the foreclosure sale for $4,000 by the bank's nominee (R. 18). How can it be said that under such circumstances the mortgagee by virtue of his contract is to be insured that the legislature will not pass a law to prevent the mortgagee from getting more than he originally bargained for. Here he received real property of a value of not less than $11,000 for $4,000, and a deficiency judgment for $16,162.12 in addition, or a total of $27,162.12 in payment of an obligation of $18,401.25 (R. 18).

The New York Legislature by Chapter 501 of the Laws of 1938 effective one day prior to the effective date of the statute here in question stated that a serious public emergency existed resulting from the abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the State and Nation, the abnormal deflation of real property values and other adverse conditions. The abnormal conditions referred to existing at the time of the foreclosure sale could not be different for mortgages executed at different times. Said Chapter 501 is printed as Appendix C hereof. The procedure provided for by the statute here in question was to confirm to the Courts its equitable powers to properly adjust the equities in connection with deficiency judgments in foreclosure actions due to abnormal deflation of real property values, and to provide the machinery therefor.

Nothing was taken away from the mortgagee. He could still foreclose the mortgage, bid in the property, and secure a deficiency judgment if the reasonable and fair value of the property foreclosed was less than his mortgage, interest and costs of foreclosure. Under the statute in question nothing whatever has been taken away from the mortgagee.

Conclusion

The relief requested in the petition herein should be granted and that upon the return of said Writ of Certiorari the order of the Supreme Court of the State of New York, County of Kings and of the Court of Appeals of the State of New York should be reversed and the order and judgment of the Appellate Division of the Supreme Court of the State of New York, Second Department, should be affirmed.

Respectfully submitted,

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Appendix A

Decision of the Court of Appeals.

Loughran, J.—The action is one to foreclose a real property mortgage. The estate of the deceased mortgagor is liable for any deficiency which the plaintiff is entitled to recover. Our moratory deficiency judgment act is inapplicable for it does not affect mortgages or connected agreements dated on or after July 1, 1932, and the mortgage in suit was executed on December 20, 1932.

At the time of execution thereof, section 1083 of the Civil Practice Act provided that the measure of a deficiency judgment was the residue of the debt remaining unsatisfied after a sale of the mortgaged property and the application of the proceeds pursuant to the directions contained in the judgment of foreclosure and sale. So computed, the deficiency owing to the plaintiff-mortgagee, as shown by the report of the referee to sell, was $16,162.12. The plaintiff-mortgagee was the purchaser on foreclosure. It was noted in the court below that the sale price of $4,000 was not shockingly inadequate and that there was no showing of specific hope that much more would be obtained upon a resale (257 App. Div., 465, at p. 467.) On February 2, 1939, Special Term confirmed the report of the referee and ordered that a judgment for the stated deficiency should be docketed in favor of the plaintiff-mortgagee against the estate of the deceased mortgagor.

The judgment of foreclosure and sale had been entered November 15, 1938, and the sale had taken place on December 16, 1938. Theretofore and as of April 7, 1938, section 1083 of the Civil Practice Act had been amended by chapter 510 of the Laws of 1938. The gist of the change thereby made is in the provision that the amount of a deficiency judgment is to be fixed by deducting from the debt the market value of the property as determined by the

court or the sale price, whichever is higher. The 1938 amendment also provides: "If no motion for a deficiency judgment shall be made as herein prescribed the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist." This 1938 amendment we shall call the new section 1083.

On appeal by the estate of the deceased mortgagor, the Appellate Division ruled that the new section 1083 was applicable and that no motion for a deficiency judgment as therein prescribed had been made by the plaintiff-mortgagee. Accordingly the order of Special Term was modified by striking therefrom the direction for entry of a deficiency judgment and the judgment entered pursuant thereto was vacated. As appellant in this court, the plaintiff-mortgagee contends that the new section 1083, when so applied to mortgage contracts previously made, contravenes the command of the Constitution of the United States that "No State shall * * * pass any * * * Law impairing the Obligation of contracts." (Art. I. sec. 10.)

(1) The measure of a deficiency judgment prescribed by the new section 1083 is in substance prescribed also by our moratory deficiency judgment act (Civ. Prac. Act, sec. 1083-a). But that act is addressed to a declared public emergency and, as we have indicated, does not apply to mortgages or connected agreements dated (as are the instruments in suit) on or after July 1, 1932. The new section 1083 does not invoke the general welfare and sets up no conditions pertinent to emergency relief. When it was enacted in 1938 the Legislature at the same session also extended the operation of our moratory deficiency judgment act until July 1, 1939. The function of that act has since been continued and is now to be effective to July 1, 1941

(see Laws of 1938, chap. 501; Laws of 1939, chap. 607; Laws of 1940, chap. 566, 567). These circumstances make it clear to us that the new section 1083 concerns merely the private contract relationship of the parties to a real property mortgage and that as matter of fact the new section 1083 was not designed for the relief of urgent public needs (cf. Home Bldg. v. Loan Ass'n v. Blaisdell, 290 U. S. 398; Worthen Co. v. Thomas, 292 U. S. 426; Veix v. Sixth Ward Bldg. & Loan Ass'n 310 U. S., 32).

(2) On that basis, the question to be determined is whether the new section 1083 transcends the scope of the normal control over judicial remedies which the contracts clause of the Federal Constitution has left to the states. "It is well settled that while, in a general sense, the laws in force at the time a contract is made enter into its obligation, parties have no vested right in the particular remedies or modes of procedure then existing. It is true that the Legislature may not withdraw all remedies, and thus, in effect, destroy the contract; nor may it impose such new restrictions or conditions as would materially delay or embarrass the enforcement of rights under the contract according to the usual course of justice as established when the contract was made. Neither could be done without impairing the obligation of the contract. But it is equally well settled that the Legislature may modify or change existing remedies or prescribe new modes of procedure, without impairing the obligation of contracts, provided a substantial or efficacious remedy remains or is given by means of which a party can enforce his rights under the contract" (Oshkosh Wateworks Co. v. Oshkosh, 187 U. S. 437, 439. See the cases brought together in Home Bldg. & Loan Ass'n v. Blaisdell supra, at p. 434).

(3) It is in order, then, next to examine the law whereby liability for a deficiency on foreclosure was regulated in this

state before the new section 1083 became operative. At this point we are pressed to give renewed consideration to the case of Monaghan v. May (242 App. Div., 64, 65). The foreclosure sale there involved was held before our moratory mortgage legislation took effect. The court, however, judicially noticed an earlier existence of the emergency thereby declared. Upon findings that the true value of the property equalled the mortgage debt and that the mortgagee was the purchaser at a price so inadequate as to shock the conscience of the court, all liability for a deficiency was canceled, independently of statute and by dint of an avowal by the court of its "inherent power to place limitations upon the remedies available to a mortgagee in consonance with fundamental doctrines of equity." Acceptance of all that was so decided obviously would not answer the question now before us, since the new section 1083 is not emergency legislation, is not confined to cases where the sale price shocks the conscience, and is applicable whether a purchaser on foreclosure is the mortgagee or is a third party.

It may be worth while, however, to detail what actually was connoted by the broad statements made by the court in the Monaghan case. In Guaranteed Title & Mortgage Co. v. Scheffres (246 App. Div., 532) the mortgage debt was $10,500, the sale price was $8,000, and the deficiency was $4,857.58. This inadequacy of price was found to have shocked the conscience of the court and the defendants were given leave to move retroactively for the entry of a judgment which would not finally award recovery of a deficiency (247 App. Div., 294). In Whorton v. Andretta (246 App. Div., 827) the mortgage debt was $14,000, the sale price was $7,000 and the deficiency was $8,507.23. A sale price can be inadequate only in relation to the worth of the property sold. Yet in the Whorton case the same court in pre-

cisely the same period of economic stress reversed an order that the market value of the property be determined for the purpose of ascertaining the amount of a deficiency judgment, stating its reason as follows: "We are of opinion that under the circumstances disclosed here, the purchase price was not so inadequate as to shock the conscience of the court." Again Central National Bank v. Marks (243 App. Div., 526), the same court declared that the equitable relief considered in Monaghan v. May is not available to mortgagors "possessed of independent means."

As thus employed, the theory of Monaghan v. May seemed to us to go against the grain of settled ideas of the nature of equity. The "conscience" which is an element of the equitable jurisdiction is not the private opinion of an individual court, but is rather to be regarded "as a metaphorical term, designating the common standard of civil right and expediency combined, based upon general principles and limited by established doctrines, to which the court appeals and by which it tests the conduct and rights of suitors—a judicial and not a personal conscience" (1 Pomeroy's Equity Jurisprudence, 4th ed., sec. 57; so. 1 Spence, Equitable Jurisdiction of the Court of Chancery, pp. 413, 414; Snell, Principles of Equity, 22d ed., p. 3. In that view the "doctrine" of Monaghan v. May was rejected by us when Guaranteed Title & Mortgage Co. v. Scheffres (supra) was reversed in this court (275 N. Y., 30). For our part, we thought better of the doctrine stated by that learned lawyer, Dillon, J., in these words: "Creditors have rights, as well as debtors. Court stand between the two [and] administer law *just as it is,* with even-handed impartiality * * *" (Sloan v. Waugh, 18 Iowa, 224, 227).

The law which the court called upon in Monaghan v. May was in that case stated as follows: "To obtain a deficiency judgment and determine the amount thereof, it is necessary

to invoke equitable power to confirm the sale had under the judgment of foreclosure. * * * No rights vest, perforce the judgment of foreclosure, in plaintiff for a deficiency judgment in any amount until plaintiff satisfies a court of equity that it would be equitable and just, as a consequence of what has occurred on the sale, to authorize the entry of a deficiency judgment" (242 App. Div., at pp. 66, 67). This statement did not accurately represent the New York law which (prior to the enactment of our moratory mortgage legislation) regulated the general right to recovery of a deficiency judgment in an action to foreclose a real property mortgage.

On the contrary, our previously existing statutory law of foreclosure had been interpreted in this manner: Liability for a deficiency was to be finally determined by the judgment of foreclosure and sale. The subsequent docketing of a deficiency judgment was a merely clerical act. Execution for a deficiency was issuable before confirmation of the report of the referee to sell or before a deficiency judgment was docketed, unless the court directed a resale in order to relieve a party from the consequences of unfairness, fraud, surprise or mistake. The deficiency was to be ascertained by a sale of the mortgaged premises and not by the estimates of witnesses or other less satisfactory evidence (Civ. Prac. Act, fromer sec. 1083; Morris v. Morange, 38 N. Y., 172; Wager v. Link, 134 N. Y., 122; Frank v. Davis, 135 N. Y., 275; Feiber Realty Corp'n v. Abel, 265 N. Y., 94; Emigrant Indus. Sav. Bank v. Van Bokkelen, 269 N. Y., 110; Bondy v. Aronson & List Realties, Inc., 227 App. Div., 136; Housman v. Wright, 50 App. Div., 606; see Thomas on Mortgages, 2d ed., sec. 832). This procedure always meant that on foreclosure the mortgagor was entitled to credit only for the net proceeds of sale realized by the mortgagee after the deduction of liens for taxes, &c., with resultant liability to the mortgagor for the deficiency (Marshall v.

Davies, 78 N. Y., 414, 422)—a rule that was in keeping with the generally accepted proposition that a mortgagee owed no duty to his mortgagor to protect the equity of redemption but might deal with the mortgagor in respect of the mortgaged premises upon the same footing as any other person (see Ten Eyck v. Craig, 62 N. Y., 406, 421; Louisville Joint Stock Land Bank v. Radford, 295 U. S., 555, 579, 580; Rules Civ. Prac., Rule 259; Thomas on Mortgages, 2d ed., secs. 972, 988). It was this system of foreclosure that entered into the engagement of the present parties and created and defined the legal and equitable obligations of their contract (Bronson v. Kinzie, 1 How., U. S., 311).

(4) This system of foreclosure has been markedly changed by the new section 1083. Under that section a mortgagee must on foreclosure bid in the property at a price that shall at least equal the market value as that value may thereafter be determined by the court or must go without any satisfaction of so much of the debt as equals the difference between the value as so determined and a lower price paid on a sale to a third party. These substantial alterations of the former statutory status of mortgages are not to be temporary. They are not conditioned upon any equitable factor and leave no room for the play of any equitable consideration. They benefit every mortgagor, irrespective of the character or amount of his investment, and they burden every mortgagee, no matter what his necessities. They reach, indeed, to all situations where for any reason whatever the price paid by any purchaser on a valid foreclosure sale falls short of the market value of the property as subsequently determined by the court.

In the face of all this, we do not see how a retroactive operation of the new section 1083 can be reconciled with the principle "that the laws which prescribe the mode of enforcing a contract, which are in existence when it is made, are so far apart of the contract that no changes in these

laws which seriously interfere with that enforcement are valid, because they impair its obligation within the meaning of the Constitution of the United States" (Barnitz v. Beverly, 163 U. S. 118, 122). Consequently, we conclude that as to mortgage contracts previously made (as are the contracts in suit) the new section 1083 is void (see Home Bldg. & Loan Ass'n v. Blaisdell, supra, at pp. 431-434; New York Life Ins. Co. v. Guttag Corp'n, 265 N. Y., 292, 296).

(5) The foregoing presupposed the absence of any remedy substantially coextensive with that afforded by the former section 1083. We believe no such remedy exists.

Apart from our moratory mortgage legislation, a mortgagee of real property may still recover judgment for the mortgage debt as if no mortgage secured it. This remedy of an action at law for the debt cannot, we think, be deemed to be a fair equivalent of the remedy afforded by the former section 1083; inasmuch as the judgment debtor's equity of redemption cannot be sold under an execution issued upon a judgment for the mortgage debt or any part thereof (Civ. Prac. Act, sec. 710).

From the beginning our statutory system of foreclosure has prohibited a second action to recover a deficiency resulting on a foreclosure sale (Civ. Prac. Act, sec. 1078). Though power to relax that prohibition was conferred upon the court, the general rule was against the exercise thereof, and it was settled that the burden of such a second suit was not to be laid upon a party who could have been made a defendant in the foreclosure action unless special circumstances were shown which manifestly required that course (Equitable Life Ins. Soc'y v. Stevens, 63 N. Y., 341; Scofield v. Doscher, 72 N. Y., 491; Vanderbilt v. Schreyer, 91 N. Y., 392; Morrison v. Slater, 128 App. Div., 467; Darmstadt v. Manson, 144 App. Div., 249; Stehl v. Uris, 210 App. Div., 444). Leave to bring so restricted a second suit is not to be granted in proceedings under our moratory

deficiency judgment act (Civ. Prac. Act, sec. 1083-a; Honeyman v. Hanan, 275 N. Y., 382, 392). Even if we assume that the new section 1083 has not likewise superseded section 1078 of the Civil Practice Act, in our judgment the limited judicial discretion permitted by section 1078 could not be made an effective instrumentality for the replenishment of the rights which section 1083 has now taken away from mortgagees.

(6) The new section 1083 was enacted upon the recommendation of a joint legislative committee whose report said: "The present emergency Deficiency Judgment Law can no doubt be made permanent if the Legislature so desires, under the authority of the decision of the United States Supreme Court in the case of Richmond Mortgage & Loan Corp'n v. Wachovia Bank & Trust Co. et al., ex'rs, 300 U. S., 124" (Leg. Doc., 1938, No. 58). In the case thus cited the court upheld a North Carolina statute providing that when the holder of an obligation secured by real estate causes a trustee's sale of the property, at which such holder becomes the purchaser for less than the amount of the debt and thereafter such holder brings an action for a deficiency, the defendant may show, by way of defense and setoff, that the property sold was fairly worth the amount of the debt, or that the amount bid was substantially less than the true value of the property, and thereby defeat any deficiency judgment against him in whole or in part. This North Carolina statute has no application if the purchaser at the trustee's sale be other than the mortgagee. It affects only foreclosure under powers of sale and does not apply to foreclosure sales, made pursuant to an order or decree of the court. The new section 1083 contains no such limitations, and as we hold, cannot be sustained (as was this North Carolina statute) on the principle that the obligation of a contract is not impaired by a statute limit-

ing the remedy, if a remedy adequate for enforcing the obligation remains or is substituted.

(7) In short, our conclusion is that section 1083 of the Civil Practice Act, as amended by chapter 510 of the Laws of 1938, cannot be constitutionally applied to mortgage contracts previously made, and that as to such contracts the former section 1083 is in force and effect.

The order of the Appellate Division should therefore be reversed and that of the Special Term affirmed and its judgment reinstated, without costs.

LEWIS, J. (dissenting)—Our problem is to determine whether section 1083 of the Civil Practice Act as amended by chapter 510 of the Laws of 1938 (effective April 7, 1938) may be constitutionally applied to proceedings upon the foreclosure of a mortgage executed prior to April 7, 1938.

From time to time Hammond & Carpenter Corporation had secured commercial loans from the plaintiff-appellant, to which it will be convenient to refer as the bank. The payment of those loans was guaranteed by George U. Hammond and James J. Carpenter, now deceased, whose executors are defendants in this action. As security for his obligation as such guarantor, James J. Carpenter executed and delivered to the bank on December 29, 1932, a mortgage which became the subject of the present foreclosure action when, in 1937, Hammond & Carpenter Corporation failed to pay certain of its loans. By the judgment of foreclosure and sale herein, entered November 15, 1938, the amount due the bank was $18,401.25. At the foreclosure sale which followed on December 16, 1938, the mortgaged premises were purchased by the bank's nominee for $4,000. On January 23, 1939, when the bank applied at Special Term for an order confirming the referee's report of sale and for a deficiency judgment in the amount of $16,162.12 against

the estate of James J. Carpenter, deceased, the respondent Hammond, as executor, applied by cross-motion, in connection with the bank's application for a deficiency judgment, for an order fixing the real value of the premises foreclosed upon the ground "that the sale price was wholly inequitable * * *" and that it would be unconscionable to permit the bank to enter a deficiency judgment herein according to its demand. In support of his cross-motion, and in opposition to the bank's motion to confirm the referee's report and for a deficiency judgment, the respondent executor submitted affidavits in which the mortgaged premises were appraised at $11,000. In opposition to the respondent's cross-motion the bank asserted that Special Term was without power to grant the relief sought and submitted an affidavit by a real estate expert appraising the property, on the basis of its income, at $6,500. Thereupon Special Term denied the respondent's cross-motion, granted the bank's application to confirm the referee's report of sale and directed the entry of a deficiency judgment.

Upon appeal to the Appellate Division the order at Special Term was modified by striking therefrom the provision granting a deficiency judgment to the bank and directing that such judgment be vacated. The Appellate Division ruled that section 1083 of the Civil Practice Act, as amended by chapter 510 of the laws of 1938, impaired no substantial rights of the mortgagee and, as affecting the remedy of the bank as mortgagee in this foreclosure action, that section 1083 as amended is constitutional and that the bank had made no application at Special Term for a deficiency judgment as required by section 1083.

When the mortgage here in foreclosure was executed on December 29, 1932, and thereafter, in the year 1937, when the moneys secured thereby were advanced by the bank, section 1083 of the Civil Practice Act read as follows:

Appendix A

"Sec. 1083, Judgment for deficiency. If a person who is liable to the plaintiff for the payment of the debt secured by the mortgage is made a defendant in the action, and has appeared or has been personally served with the summons, the final judgment may award payment by him of the residue of the debt remaining unsatisfied, after a sale of the mortgaged property, and the application of the proceeds, pursuant to the directions contained therein."

On April 7, 1938—prior to the entry of the deficiency judgment herein—chapter 510 of the Laws of 1938 became effective, amending section 1083 by providing that upon any application for a deficiency judgment in a foreclosure action the mortgagee was required to credit, on the mortgage debt either the price obtained for the mortgaged premises at the foreclosure sale, as formerly required by section 1083, or the amount which the court might determine, upon affidavits or otherwise, to be the fair and reasonable market value of the mortgaged premises, whichever is higher. The fact is also stressed that, unlike section 1083-a of the Civil Practice Act and kindred moratory legislation, which is limited to the period of emergency declared by the Legislature, the 1938 amendment to section 1083 is permanent in character.

The bank, as appellant before us, argues that under the contract provision of the Federal Constitution the new provisions of section 1083 may not be applied to the mortgage herein foreclosure which was executed before the amendment became effective. In support of its position the bank invokes the principle that laws affecting either the enforcement or construction of a contract and subsisting at the time and place of its making and the place of its performance enter into and form a part of the contract itself (Farmers & Merchants Bank v. Federal Reserve Bank, 262 U. S., 649, 660; New York Life Ins. Co. v. Guttag Corp'n, 265 N. Y., 292, 296). With this rule as a premise the bank challenges, as violative of section 10 of

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Article I of the Federal Constitution, the 1938 amendment to section 1083 which, it is said, affects adversely the bank's rights by changing the remedy by foreclosure which the statute formerly made available to it as a mortgagee—the principle change being that in arriving at the amount of a deficiency judgment there shall be credited upon the mortgage debt either the market value of the mortgaged property, as determined by the court, or the price obtained therefor at the foreclosure sale, whichever is higher. The vice of the new statute is said to be that it changes the medium of payment of the debt which was agreed upon by the parties to the mortgage prior to the amendment of section 1083 and in practical effect compels the bank as mortgagee to accept in payment of the debt a parcel of real property instead of lawful money of the United States.

I have reached the conclusion that the statute thus challenged, when applied to the case at bar, does not impair the contract rights possessed by the bank when the mortgage here in foreclosure was executed. That conclusion has been influenced by an examination of the change in remedies for the collection of a mortgage debt made available to a mortgagee at common law and under statutes prior to the amendment here in question.

Prior to the enactment of the statute from which section 1083 was derived a deficiency judgment could not be had in a foreclosure action. If the proceeds from a foreclosure sale failed to extinguish the mortgage debt and the mortgagee desired to collect any balance due, his only recourse was to an action at law. Finding burdensome the necessity of bringing two actions to collect a mortgage debt, the Legislature added to the statutory procedure governing foreclosure the permissive measure that a personal judgment for a deficiency might be given in a foreclosure action against any party liable for the mortgage debt (2 Rev. Stat., 1st ed., p. 191, sections 151, 152, 154). The statute then enacted

finally found its place, by transposition and amendment, in the Civil Practice Act as section 1083 (Throop's Code, notes to sections 1628 and 1630; Frank v. Davis, 135 N. Y., 275, 277, 278; Reichert v. Stilwell, 172 N. Y., 83, 88; Jamaica Sav. Bank v. M. S. Investing Co., 274 N. Y., 215, 218-220). In tracing the history of this statute it is important to our present inquiry to note the language of Chief Judge Cullen writing for this court in 1910 in Rutherford Realty Co. v. Cook (198 N. Y., 29, 33): "Before the enactment of those statutes (2 R. S., sections 151-154) a mortgagee to collect a deficiency was compelled to resort to an action at law after the sale under a decree in equity. *This course may still be pursued, though leave of the court is necessary for the institution of the second action.*" (Emphasis supplied.)

It is thus seen that the Legislature, while favoring and making provision for the collection of the mortgage debt by one action, did not see fit to abolish the action at common law which remains to-day as a remedy available to the mortgagee under certain conditions. I find nothing in the 1938 amendment to section 1083 which abolishes the separate common-law action where the mortgage was executed after July 1, 1932. The policy of the Legislature adopted in 1830 finds expression in the present statute, that a deficiency judgment shall be sought to the action for foreclosure. However, if a deficiency judgment is not sought in the foreclosure action "the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist." This provision indicates that a "right to recover any deficiency" in some other action or proceeding still exists under some circumstances. One of those circumstances is present when the person liable to the plaintiff for the payment of the mortgage debt is not "made a defendant in the action" and has not "appeared or

* * * been personally served with the summons" (sec. 1083). Another circumstance which, with leave of the court (Civ. Prac. Act, sec. 1078), permits a mortgagee to bring a separate action at law, is present when the person liable for the mortgage debt is joined as a defendant and personally served but there remains a difference between the amount received at the foreclosure sale and the determined value of the property.

Stated otherwise, the change in the law effected by the 1938 amendment does not deprive the mortgagee of the right to receive the full amount of the mortgage debt in the same medium of payment as was afforded to him prior to that amendment. It merely restricts the method perviously provided. Then he could demand a deficiency judgment in the foreclosure action or, failing so to demand, there remained for him the right to sue at law subject to leave of the court (Rutherfurd Realty Co. v. Cook, supra, p. 33). There being no specific provision in section 1083 as amended extinguishing the action at law, the presumption is that such a right of action remains conditioned upon the provisions of section 1078 and provided the mortgagee has demanded a deficiency judgment in the foreclosure action. The separate action at law for a deficiency is a common-law right. The court must construe strictly a statute which is susceptible of an interpretation in derogation of the common law. I do not think the Legislature intended to destroy the common-law right of action to recover the full deficiency from the party liable who is joined as a defendant and served, and still preserve the right to recover the full deficiency against one who, either because he is without the state or for some other reason is not joined as a party defendant and served. By the 1938 amendment to section 1083 the Legislature had said that where a person liable for the mortgage debt is joined as a defendant and is personally served, the mortgagee must seek a deficiency judg-

ment to avoid (1) an adjudication that the proceeds of the foreclosure sale of whatever amount shall satisfy the mortgage, and (2) forfeiting a right to recover any deficiency in another action. If a deficiency judgment is asked it may be granted in that amount only which equals the difference between the determined value of the mortgaged property and the debt, or the difference between the sale price and the debt, whichever difference is smaller. If there remains a portion of the debt unsatisfied between the amount received at the sale and the determined value, the mortgagee may bring an action at law on the bond, subject to leave being granted by the court under the provisions of section 1078 of the Civil Practice Act (Rutherfurd Realty Co. v. Cook, supra, p. 33). The constitutionality of section 1078 of the Civil Practice Act has never been challenged (Honeyman v. Hanan, 275 N. Y., 382, 392).

The 1938 amendment to section 1083 does not accomplish as to mortgages executed after July 1, 1932, the result intended by section 1083-a as to mortgages executed prior to that date. Section 1083-a provides that as to mortgages executed prior to 1932: "No judgment shall be granted for any residue of the debt remaining unsatisfied * * * *except as herein provided.*" That provision can only mean, as was pointed out in Honeyman v. Hanan (supra, p. 392), that the statute was "* * * intended to provide an *exclusive* procedure for the entry of a judgment for any residue of a debt secured by mortgage after sale of the mortgaged premises." Its prohibition applied whether a deficiency was demanded in the foreclosure suit or sought to be recovered by a separate action at law. No such exclusive provision governs procedure under section 1083 in reference to mortgages executed after 1932, as was the mortgage now before us. True it is that the procedure outlined in the 1938 amendment to section 1083 for securing a judgment for any amount of the mortgage debt remaining unsatisfied

after the sale of the mortgaged property, is not the same as that in effect at the time the mortgage here in suit was executed. But the mortgagee still retains the right to recover the full deficiency on a mortgage executed after July 1, 1932, where the person liable was not joined as a defendant and personally served. The mortgage also retains the right to recover in a separate action, subject to section 1078 of the Civil Practice Act, the difference between the amount recovered in the foreclosure action and the amount of the mortgage debt, provided in the foreclosure action he has joined the person liable as a defendant and served him personally, and has asked for a deficiency judgment pursuant to the amended section 1083.

The difference in the scope and purpose of sections 1083 and 1083-a is indicated by the opening sentence of each. Section 1083 states that the procedure thereby provided for determining the amount of the deficiency shall apply only "If a person who is liable to the plaintiff for the payment of the debt secured by the mortgage is made a defendant in the action, and has appeared or has been personally served with the summons * * *;" whereas section 1083-a provides that "*No* judgment shall be granted for any residue of the debt remaining unsatisfied * * *" except as therein provided. Admitting that section 1083-a provides an exclusive method of obtaining a deficiency judgment on the foreclosure of mortgages dated prior to July 1, 1932, it is apparent that section 1083 does not apply if the person liable to the plaintiff for the payment of the mortgage debt is not made a defendant in the action or has not appeared or has not been personally served with the summons. In such circumstances section 1083 does not provide the exclusive method for obtaining a deficiency judgment. If the statute is not to be so interpreted but instead is to be understood as providing the exclusive method of obtaining a deficiency judgment where, as in the present case, the

party liable is joined and has appeared, then the statute is unconstitutional because it provides for an unreasonable classification of parties defendant and unreasonably discriminates against a party plaintiff who chooses to join as a defendant the party who is liable for the payment of the mortgage debt.

There is no constitutional guaranty that a mortgagee shall always have the right to secure a judgment for the full amount *in one action*. We have seen that for many years prior to the enactment of section 1083 a mortgagee was adequately protected by procedure which then allowed a separate action at law to collect a deficiency. The mortgagee still retains that right and in addition the right to recover a part or all of the deficiency in the foreclosure action.

Finally, I am unable to agree with the decision of the Appellate Division that the bank's motion for leave to enter a deficiency judgment was not a sufficient compliance with section 1083 as amended by chapter 510 of the Laws of 1938, to constitute an application thereunder for such a judgment.

I therefore dissent from the view of a majority of the court and favor a modification of the order of the Appellate Division by providing for the remission of the case to Special Term with directions to proceed in accord with the provisions of section 1083 of the Civil Practice Act, as amended by chapter 510 of the Laws of 1938, to determine the fair and reasonable market value of the mortgaged premises as a basis for any deficiency judgment which the application of that statute may warrant and as modified affirmed, without costs.

LEHMAN, CH. J., FINCH, RIPPEY, SEARS and CONWAY, JJ., concur with LOUGHRAN, J.; LEWIS, J., dissents in opinion.

Appendix B

Section 1083 of the Civil Practice Act, prior to the 1938 amendment, read as follows:

> "If a person who is liable to the plaintiff for the payment of the debt secured by the mortgage is made a defendant in the action, and has appeared or has been personally served with the summons, the final judgment may award payment by him of the residue of the debt remaining unsatisfied, after a sale of the mortgaged property, and the application of the proceeds, pursuant to the directions contained therein."

Chapter 510 of the Laws of 1938, in effect April 7, 1938, amended Section 1083 to read as follows (italics indicate amendment):

> "Section 1083. Judgment for Deficiency; *Limitation.* If a person who is liable to the plaintiff for the payment of the debt secured by the mortgage is made a defendant in the action, and has appeared or has been personally served with the summons, the final judgment may award payment by him of the *whole* residue, *or so much thereof as the court may determine to be just and equitable,* of the debt remaining unsatisfied, after a sale of the mortgaged property and the application of the proceeds, pursuant to the directions contained *in such judgment, the amount thereof to be determined by the court as herein provided. Simultaneously with the making of a motion for an order confirming the sale provided such motion is made within ninety days after the date of the consummation of the sale by the delivery of the proper deed of conveyance to the purchaser in all cases where the sale is held after the date this section as hereby amended takes effect, and in all cases where the sale was held prior to the date this section*

as hereby amended takes effect and said sale has not heretofore been confirmed, then within ninety days from the date this section as hereby amended takes effect or within ninety days after the date of the consummation of the sale by delivery of the proper deed of conveyance to the purchaser, regardless of whether the sale was held prior or subsequent to or on the date this section as hereby amended takes effect, the party to whom such residue shall be owing may make a motion in the action for leave to enter a deficiency judgment upon notice to the party against whom such judgment is sought or the attorney who shall have appeared for such party in such action. Such notice shall be served personally or in such other manner as the court may direct. Upon such motion the court, whether or not the respondent appears, shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date such premises were bid in at auction or such nearest earlier date as there shall have been any market value thereof and shall make an order directing the entry of a deficiency judgment. Such deficiency judgment shall be for an amount equal to the sum of the amount owing by the party liable as determined by the judgment with interest, plus the amount owing on all prior liens and encumbrances with interest, plus costs and disbursements of the action including the referee's fee and disbursements, less the market value as determined by the court or the sale price of the property whichever shall be the higher. If no motion for a deficiency judgment shall be made as herein prescribed the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist."

Appendix C

Chapter 501 of the New York Laws of 1938 in effect April 6, 1938, reads in part as follows:

"§ 1. It is hereby declared that a serious public emergency affecting and threatening the welfare, comfort and safety of the people of the state and resulting from the abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the state and nation, the abnormal deflation of real property values and the curtailment of incomes by unemployment and other adverse conditions, still exists. Therefore in the public interest, the necessity for legislative intervention by the enactment of the provisions hereinafter prescribed, and their application until July first, nineteen hundred thirty-nine is hereby declared as a matter of legislative determination."

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Supreme Court of the United States

OCTOBER TERM 1940

No. 740

JULIA C. GELFERT, as sole Surviving Executor of the Last Will and Testament of JAMES J. CARPENTER, deceased,

Petitioner,

against

NATIONAL CITY BANK OF NEW YORK,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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against

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Respondent.

No. 740.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The respondent in its brief states that the first reason why this Court should deny the petition herein is that the petitioner defaulted in the Court below and has no standing to apply for the writ herein sought.

This action was originally brought by the plaintiff against Julia C. Gelfert and George U. Hammond, as Executors of the Last Will and Testament of James J. Carpenter, deceased (R. 2). The estate of James J. Carpenter was therefore the party against whom the proceeding was brought, and the individuals were named solely in their representative capacities as executors.

The Appellate Division in reversing the lower Court modified the judgment by striking out the deficiency judgment against the Estate of James J. Carpenter (R. 30). This reversal by the Appellate Division did not maintain or make effective any personal judgment against Julia C. Gelfert as one of the executors of the estate of James J. Carpenter, deceased, or against said estate (R. 30).

The remittitur of the Court of Appeals of the State of New York reinstated the entire judgment (R. 38), and the order of the Supreme Court of the State of New York, Kings County, making the order of the Court of Appeals the order of said Supreme Court, Kings County, reinstated the deficiency judgment against Julia C. Gelfert, and George U. Hammond, as executors under the Last Will and Testament of James J. Carpenter, deceased (R. 39).

Thereafter the said Julia C. Gelfert as sole surviving executor of the Last Will and Testament of James J. Carpenter, deceased, secured an order from said Supreme Court, Kings County, amending the title of the action to properly reflect the death of said George U. Hammond, one of the said executors of said estate (R. 40-41).

Upon the death of said George U. Hammond, all of the rights, powers and privileges of the estate of James J. Carpenter, were thereupon vested in the said sole surviving executor, Julia C. Gelfert, who is the petitioner herein.

Section 93, of the New York Surrogate's Court Act provides: "Where one of two or more executors or administrators dies * * * a successor to the person who dies * * * shall not be appointed except where such an appointment is necessary in order to comply with the express terms of a Will; but the others may proceed and complete the administration of the estate pursuant to the letters, *and may continue any action or special proceeding brought by or against all.*" (Italics ours.)

The foregoing section of the New York Surrogate's Court Act specifically vested all right and title to continue the present proceeding in the sole surviving executor, Julia C. Gelfert, the petitioner herein. This was confirmed by the order of said Kings County Supreme Court (R. 40-41). The respondent cannot collaterally attack petitioner's standing or the said order of the Kings County Supreme Court.

It is therefore respectfully submitted that the first objection made by the respondent is not sustained, and that

the estate of James J. Carpenter is properly before this Court on this application through said Estate's sole surviving executor.

On page 9 of respondent's brief it is indicated that petitioner invokes the jurisdiction of this Court on the ground that the present case is in conflict with *Honeyman* v. *Jacobs,* 306 U. S. 539.

On page 4 of our petition it is stated that one of the reasons for granting the writ herein is that the present decision is contrary to *Richmond Loan and Mortgage Corporation* v. *Wachovia Bank & Trust Company,* 300 U. S. 124.

It is therefore respectfully submitted that the relief requested for in the petition be granted.

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IN THE

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OCTOBER TERM, 1940.

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JULIA C. GELFERT, as Sole Surviving Executor of the Last Will and Testament of James J. Carpenter, Deceased,

Petitioner,

—against—

THE NATIONAL CITY BANK OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

BARNEY B. FENSTERSTOCK,
Solicitor for Respondent.

HARRY ZALKIN,
Of Counsel.

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Petitioner,

—against—

THE NATIONAL CITY BANK OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Summary Statement of Matter Involved.

On December 29, 1932 James J. Carpenter, to secure his guaranty of the payment of commercial loans made and to be made by respondent to Hammond & Carpenter Corporation, executed and delivered to said respondent a mortgage covering certain property in the County of Kings, City of New York (R. 20).

Upon the non-payment of certain of such loans made in 1937, this action to foreclose said mortgage was brought against, among others, Julia C. Gelfert (the petitioner herein) and George U. Hammond, as Executors of the Last Will and Testament of said James J. Carpenter, then deceased. Each of said executors appeared by separate counsel (R. 6). On

November 15, 1938 judgment of foreclosure and sale was duly entered fixing the amount due to respondent upon said mortgage at $18,401.25 (R. 5). The foreclosure sale was held on December 16, 1938 and the property was purchased by respondent's nominee for $4,000 (R. 11). The appellate courts below found that this price was not shockingly inadequate and that no likelihood of a greater realization on a resale had been shown (257 App. Div. at 467; 284 N. Y. at 14).

On January 23, 1939 respondent moved to confirm the Referee's report of sale and for a deficiency judgment against the Estate of James J. Carpenter in the amount shown by said report, to wit: the sum of $16,162.12 (R. 5-6).

The petitioner, as one of the executors, defaulted on said motion.

George U. Hammond, the other executor, made a cross-motion as such co-executor "for an order fixing the real value of the premises foreclosed for the purposes of deficiency judgment proceedings upon the ground that it would be inequitable and unconscionable to permit the plaintiff herein to enter a deficiency judgment * * * upon the ground that the sale price was wholly inequitable and unconscionable * * *" (R. 19-20).

The Supreme Court of the State of New York, Kings County, without opinion, granted respondent's motion, confirmed the referee's report of sale, directed a deficiency judgment as shown by that report, and denied Hammond's cross-motion (R. 27, 3-4).

On Hammond's appeal to the Appellate Division of said Supreme Court, the aforesaid order was modified by striking therefrom the provisions for a deficiency judgment and as so modified was affirmed (R. 29-30), the Court holding that the amendment to Section

1083 of the N. Y. Civil Practice Act which became effective April 7, 1938 (hereinafter called the "new Section 1083") was applicable to the case at bar and that respondent had made no application for a deficiency judgment thereunder (R. 31-37).

On respondent's appeal to the Court of Appeals of the State of New York, the determination of the Appellate Division was reversed and that of the Supreme Court, Kings County was reinstated (R. 37-38).

While the aforesaid appeal was pending in the Court of Appeals, Hammond died and after the remittitur from said Court of Appeals had been filed, an order was entered by the Supreme Court, Kings County amending the caption of this action by eliminating the name of said Hammond and showing the petitioner as the "sole surviving executor of the Last Will and Testament of James J. Carpenter, Deceased" (R. 40).

Reasons for Denial of Writ.

This Honorable Court, in the exercise of its discretion, should deny the petition for certiorari for the following reasons:

1. The petitioner, having defaulted on the motion which resulted in the order and judgment sought to be appealed from, has no standing to apply for certiorari.

2. No substantial federal question is presented for review because

(a) in holding that respondent was entitled, as a matter of contractual right, to a deficiency judgment

for the difference between the mortgage debt and the proceeds of the foreclosure sale, the Court of Appeals followed and applied the long established law of the State of New York; and

(b) in holding that the new Section 1083 materially changed respondent's right to such deficiency judgment and thus impaired the obligations of its contract, in contravention of Article 1, Section 10 of the Federal Constitution, the decision of the Court of Appeals is in accord with the applicable decisions of this Honorable Court.

Argument.

POINT I.

The petitioner has no right of appeal from the order and judgment at bar.

The order and judgment which this application seeks to review confirmed the referee's report of sale and directed the entry of a deficiency judgment in the amount shown by said report. On respondent's motion for that relief, the petitioner defaulted. In neither of the subsequent appeals therefrom was the petitioner a party, appellant or respondent. Said petitioner, therefore, has no right to appeal from said order and judgment, and accordingly no standing to apply for certiorari.

New York Civil Practice Act, Section 557.

The fact that George U. Hammond, a co-executor, represented by separate counsel who now appear for petitioner, opposed the aforesaid motion and partici-

pated in the appeals therefrom does not vest in petitioner any right of appeal from an order and judgment duly entered upon her deliberate default. Hammond's death does not transfer to petitioner as surviving executrix any right of appeal which Hammond might have had if he had continued as an executor.

POINT II.

No substantial federal question is presented for review.

The Court of Appeals has held in the case at bar that when the mortgage was executed on December 29th, 1932 and thereafter in 1937 when the monies secured thereby were advanced by respondent, the statutory system of foreclosure in New York, as judicially interpreted, provided that liability for a deficiency was finally determined by the judgment of foreclosure and sale, the subsequent docketing of a deficiency judgment being a merely clerical act; and that the measure of such deficiency judgment was the residue of the debt remaining unsatisfied after a sale of the mortgaged property and the application of the proceeds pursuant to the directions of the judgment of foreclosure and sale (N. Y. Civ. Prac. Act, former Section 1083; *Morris* v. *Morange*, 38 N. Y. 172; *Marshall* v. *Davies*, 78 N. Y. 414, 422; *Wager* v. *Link*, 134 N. Y. 122; *Feiber Realty Corp.* v. *Abel*, 265 N. Y. 94; *Emigrant Industrial Savings Bank* v. *Van Bokkelen*, 269 N. Y. 110).

Under principles long settled by decisions of this Honorable Court, the method of enforcement thus

provided became part of the contract of the parties (*Bronson* v. *Kinzie,* 1 How. (U. S.) 311; *Farmers Bank* v. *Federal Reserve Bank,* 262 U. S. 649, 660) and could not constitutionally be changed, in any material respect, by subsequent legislation, at least unless a remedy substantially coextensive therewith remained after the subsequent legislation or was furnished thereby (*Edwards* v. *Kearzey,* 96 U. S. 595; *Clark* v. *Reynolds,* 8 Wall. (U. S.) 318, 322; *Barnitz* v. *Beverly,* 163 U. S. 118, 122).

Preliminarily, it is to be noted that the new Section 1083 is neither emergency nor temporary legislation (*cf. Home Building & Loan Ass'n* v. *Blaisdell,* 290 U. S. 398). It is a permanent statute applicable to foreclosures of all mortgages, regardless of date, amount or parties, and contains no provisions apposite to the relief of any pressing public needs (*cf. W. B. Worthen Co.* v. *Thomas,* 292 U. S. 426). Concurrently with its enactment in 1938, the Legislature extended the operation of the New York moratory deficiency judgment act (N. Y. Civ. Prac. Act, Section 1083-a, which provides, in respect of mortgages dated prior to July 1st, 1932, a similar measure for deficiency judgments) until July 1st, 1939 (Laws of 1938, Chap. 501), and has subsequently further extended such operation to July 1st, 1941 (Laws of 1939, Chap. 607; Laws of 1940, Chap. 566, 567). In the light of these circumstances the Court of Appeals in the case at bar has found, as a fact, that the new Section 1083 is not addressed to the general welfare of the State but is directed solely to the private contractual rights of parties to an indebtedness secured by a mortgage on real property (*cf. Veix* v. *Sixth Ward Ass'n.,* 310 U. S. 32).

That the new Section 1083 makes material and substantial changes in the previously existing system of foreclosure, as the Court of Appeals has held herein, is undeniable. Applied to pre-existing contracts, its practical effect is to change the medium of payment agreed upon by the parties from lawful money of the United States to a parcel of real estate at a hypothetical market value which, by actual test, is not then realizable and which takes no account of the expense of maintaining the property until the time, if ever, when it may be realized. Its provisions neither require nor permit consideration of any equitable factors or of the relative circumstances of the parties but compel every mortgagee in every situation to bid in the property in foreclosure at a price at least equal to the valuation which may thereafter be fixed by the court or to forego satisfaction of so much of the mortgage debt as equals the difference between the value so fixed and a lower price bid on a sale to a third party.

Finally, the Court of Appeals has found in the case at bar that no remedy substantially equivalent to that taken away by the new Section 1083 remains to the mortgagee. The right to recover the mortgage debt at law, apart from the mortgage security, is circumscribed by a prohibition against levying execution on the mortgagor's equity of redemption (N. Y. Civ. Prac. Act, Section 710). Even upon the doubtful premise that the new Section 1083 can be construed not to have superseded Section 1078 of the Civil Practice Act, which permits, by leave of court, the maintenance of a second action, after foreclosure, to recover a deficiency, authoritative rulings of long standing have restricted the discretion of the court to grant such leave to cases where special circumstances are shown

manifestly requiring that relief (*Equitable Life Assurance Society* v. *Stevens,* 63 N. Y. 341; *Scofield* v. *Doscher,* 72 N. Y. 491; *Vanderbilt* v. *Schreyer,* 91 N. Y. 392; *Morrison* v. *Slater,* 128 App. Div. 467; *Darmstadt* v. *Manson,* 144 App. Div. 249; *Stehl* v. *Uris,* 210 App. Div. 444).

This Honorable Court has uniformly invalidated state statutes similar in purpose and effect to the new Section 1083 insofar as they were sought to be applied to contracts existing at the time of enactment.

Bronson v. *Kinzie,* 1 How. (U. S.) 311;
McCracken v. *Hayward,* 2 How. (U. S.) 608;
Gantly's Lessee v. *Ewing,* 3 How. (U. S.) 707;
Barnitz v. *Beverly,* 163 U. S. 118.

At the October, 1937 term, this Honorable Court denied certiorari in a case in which the Supreme Court of South Carolina had held unconstitutional a virtually identical statute.

Jefferies v. *Federal Land Bank,* 302 U. S. 708.

In recent years, numerous state courts of last resort have likewise voided similar statutes as applied retroactively.

Bontag v. *McCurdy,* 59 Pac. (2d) 326 (Ariz.);
Adams v. *Spillyards,* 61 S. W. (2d) 686 (Ark.);
Hales v. *Snowden,* 65 Pac. (2d) 847 (Cal.);
Atlantic Loan Co. v. *Peterson,* 181 Ga. 266;
Vanderbilt v. *Brunton Piano Co.,* 111 N. J. L. 596;

Federal Land Bank v. *Garrison,* 193 S. E. 308 (S. C.), cert. denied *sub nom. Jefferies* v. *Federal Land Bank, supra;*
Langever v. *Miller,* 76 S. W. (2) 1025 (Tex.).

The case of *Honeyman* v. *Jacobs,* 306 U. S. 539, with which petitioner claims the instant decision is in conflict, is plainly distinguishable therefrom. The statute under consideration in the *Honeyman* case (Section 1083-a of the New York Civil Practice Act) was moratory legislation, occasioned by a pressing public emergency legislatively declared, and was limited both in scope and duration. The vital distinctions between such an enactment and the permanent legislation here involved have heretofore been observed by this Honorable Court (*Worthen Co.* v. *Kavanaugh,* 295 U. S. 56; *W. B. Worthen Co.* v. *Thomas,* 292 U. S. 426). Insofar as the opinion of this Honorable Court in the *Honeyman* case may have indicated that the validity of the act there considered was sustainable, apart from the existent emergency, on the ground that it merely codified a power which courts of equity in New York had always possessed to control the measure of deficiency judgments in foreclosure actions, the Court of Appeals has pointed out in the case at bar that both historically (see *Frank* v. *Davis,* 135 N. Y. 275, 277-8) and under the unbroken current of Court of Appeals decisions (*Morris* v. *Morange,* 38 N. Y. 172; *Wager* v. *Link,* 134 N. Y. 122; *Frank* v. *Davis,* 135 N. Y. 275; *Feiber Realty Corp.* v. *Abel,* 265 N. Y. 94; *Emigrant Industrial Savings Bank* v. *Van Bokkelen,* 269 N. Y. 110; *Guaranteed Title & Mortgage Co.* v. *Scheffres,* 275 N. Y. 30) no such equitable jurisdiction in foreclosure suits ever existed in the State of New York. The Appellate Division decisions in *Monaghan* v. *May,* 242 App. Div.

64, and *Guaranteed Title & Mortgage Co.* v. *Scheffres,* 247 App. Div. 294, were both overruled by the Court of Appeals (*Emigrant Industrial Savings Bank* v. *Van Bokkelen,* 269 N. Y. 110; *Guaranteed Title & Mortgage Co.* v. *Scheffres,* 275 N. Y. 30). That this Honorable Court will accept, as controlling, the pronouncements of the Court of Appeals, the highest court of New York State, as to the local law, is settled (*Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 78; *Ruhlin* v. *N. Y. Life Ins. Co.,* 304 U. S. 202).

It should also be observed in connection with the *Honeyman* case that whereas in that case the value of the mortgaged property was found "without question" to be equal to the mortgage debt, no such concession is made in the case at bar and even the petitioner's evidence indicates the contrary (R. 22-24). In fact, the judgment sought to be reviewed herein is abundantly sustainable, entirely apart from constitutional issues, on the ground that the price at which the property was purchased at the foreclosure sale represents the fair market value thereof in any event (R. 25-27), and the decision of the Supreme Court, Kings County, may be so construed.

The case of *Richmond Mortgage & Loan Corp.* v. *Wachovia Bank & Trust Co.,* 300 U. S. 124, is not, as petitioner asserts, contrary to the instant decision, but is entirely reconcilable therewith. In the cited case, this Honorable Court held that a North Carolina statute, which applied only where the sale was by a trustee under a power of sale in the mortgage deed and only where the mortgagee was the purchaser at such sale, did not impair the obligation of contract because the remedy of strict foreclosure in equity which remained to the mortgagee was substantially co-

extensive with the remedy affected by the statute. The governing principle of this decision is unquestioned—its application, however, to the case at bar leads to the opposite result in view of the inequivalence and inadequacy of the remaining remedies afforded by the law of New York, as construed by its Court of Appeals.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

BARNEY B. FENSTERSTOCK,
Solicitor for Respondent.

HARRY ZALKIN,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 740.

JULIA C. GELFERT, as sole Surviving Executor of the Last Will and Testament of James J. Carpenter, deceased,
Appellant,

—against—

THE NATIONAL CITY BANK OF NEW YORK,
Appellee.

APPELLEE'S BRIEF.

BARNEY B. FENSTERSTOCK,
Solicitor for Appellee.

ZALKIN & COHEN,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 740.

JULIA C. GELFERT, as sole Surviving Executor of the Last Will and Testament of James J. Carpenter, deceased,

Appellant,

—against—

THE NATIONAL CITY BANK OF NEW YORK,

Appellee.

APPELLEE'S BRIEF.

Jurisdiction.

Certiorari was granted by this Honorable Court on March 3, 1941 (R. 42). Jurisdiction was invoked on the petition for certiorari under Section 237 of the Judicial Code as amended and Section 350 of Title 28, U. S. C. A.

Opinions of the Courts Below.

The opinion of the New York State Court of Appeals is reported in 284 N. Y. 13, 29 N. E. (2d) 449. The opinion of the Appellate Division, Second Department is reported in 257 App. Div. 465 and is found in the record at pages 31 to 37. The memorandum opinion of the Supreme Court, Kings County is found in the record at page 27.

Summary Statement of the Case.

This action was brought by The National City Bank of New York (hereinafter called the "Bank") to foreclose a mortgage made on December 29, 1932 by James J. Carpenter to secure his guaranty of the payment of commercial loans made and to be made by the Bank to Hammond & Carpenter Corporation (R. 20).

On November 15, 1938 judgment of foreclosure and sale was entered fixing the amount due the Bank upon said mortgage at $18,401.25 (R. 5). At the foreclosure sale held on December 16, 1938 the property was purchased by the Bank's nominee for $4,000 (R. 11).

On January 23, 1939 the Bank moved to confirm the referee's report of sale and for a deficiency judgment against the Estate of James J. Carpenter, the appellant herein, in the amount shown by said report, to wit: the sum of $16,162.12 (R. 5-6).

The appellant thereupon made a cross-motion "for an order fixing the real value of the premises foreclosed for the purpose of the deficiency judgment proceedings upon the ground that it would be inequitable and unconscionable to permit the plaintiff herein to enter a deficiency judgment * * * upon the ground that the sale price was wholly inequitable and unconscionable * * *" (R. 19-20).

The Supreme Court, Kings County granted the Bank's motion, confirmed the referee's report of sale, directed a deficiency judgment as shown by that report, and denied appellant's cross-motion (R. 27, 3-4).

On appellant's appeal to the Appellate Division of said Supreme Court, the aforesaid order was modified by striking therefrom the provisions for a deficiency judgment, and as so modified was affirmed (R. 29-30), the Court holding that the amendment to Section 1083 of the New York Civil Practice Act, which became effective

April 7, 1938 (hereinafter called the "new Section 1083"), was applicable to the case at bar and that the Bank had made no application for a deficiency judgment thereunder (R. 31-37).

On the Bank's appeal to the Court of Appeals of the State of New York, the determination of the Appellate Division was reversed and that of the Supreme Court, Kings County reinstated (R. 37-38).

Argument.

POINT I.

In the light of the local law, the Court of Appeals correctly held the new Section 1083 to be unconstitutional as applied to the Bank's pre-existing mortgage.

On December 29, 1932 when the mortgage at bar was executed, and thereafter in 1937 when the moneys secured thereby were advanced by the Bank, the law of the State of New York governing the entry of deficiency judgments in foreclosure actions was Section 1083 of the Civil Practice Act, which then read as follows:

> "§1083. JUDGMENT FOR DEFICIENCY. If a person who is liable to the plaintiff for the payment of the debt secured by the mortgage is made a defendant in the action, and has appeared or has been personally served with the summons, the final judgment may award payment by him of the residue of the debt remaining unsatisfied, after a sale of the mortgaged property, and the application of the proceeds, pursuant to the directions contained therein."

Under this statute, as interpreted by the Court of Appeals, liability for a deficiency was finally determined

by the judgment of foreclosure and sale, the subsequent docketing of a deficiency judgment being a merely clerical act; and the measure of such deficiency judgment was the residue of the debt remaining unsatisfied after a sale of the mortgaged property and the application of the proceeds pursuant to the directions of the judgment of foreclosure and sale (*Morris* v. *Morange*, 38 N. Y. 172; *Marshall* v. *Davies*, 78 N. Y. 414, 422; *Wager* v. *Link*, 134 N. Y. 122; *Feiber Realty Corp.* v. *Abel*, 265 N. Y. 94; *Emigrant Industrial Savings Bank* v. *Van Bokkelen*, 269 N. Y. 110).

It is not disputed that the mortgage at bar is unaffected by the New York moratory deficiency judgment act (*New York Civil Practice Act*, §*1083a*) which by its express terms excludes mortgages executed after July 1, 1932.

The new Section 1083 provides that the mortgagee is required to credit on the mortgage debt not the amount actually realized on the foreclosure sale, but a sum which the court determines upon affidavits or otherwise was the fair and reasonable market value of the mortgaged property. By its terms this section applies "in all cases where the sale is held after the date this section as hereby amended takes effect, and in all cases where the sale was held prior to the date this section as hereby amended takes effect and said sale has not theretofore been confirmed".

We respectfully submit that the Court of Appeals correctly held that so far as this new Section 1083 was sought to be applied to the mortgage at bar, which was executed prior to its enactment, it contravened the prohibition of Article I, Section 10 of the Federal Constitution against the passage by a state of legislation impairing the obligation of contracts.

Preliminarily, it should be noted that the new Section 1083 is neither emergency nor temporary legislation (*cf. Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398). It is a permanent statute applicable to foreclosures of all mortgages, regardless of date, amount or parties, and contains no provisions apposite to the relief of any pressing public needs (*cf. W. B. Worthen Co.* v. *Thomas*, 292 U. S. 426). Concurrently with its enactment in 1938, the New York legislature extended the operation of the aforementioned moratory deficiency judgment act until July 1, 1939 (*Laws of 1938, Chap. 501*) and has subsequently further extended such operation to July 1, 1941 (*Laws of 1939, Chap 607*; *Laws of 1940, Chaps. 566, 567*). In the light of these circumstances, the Court of Appeals in the case at bar has found as a fact that the new Section 1083 is not addressed to the general welfare of the state, but is directed solely to the private contractual rights of parties to an indebtedness secured by a mortgage on real property (*cf. Veix* v. *Sixth Ward Association*, 310 U. S. 32).

This Honorable Court has consistently held that the law which provides a remedy for the enforcement of a contract, as that law exists at the time of the making of the contract, enters into and becomes part of such contract as if fully set forth therein (*Farmers Bank* v. *Federal Reserve Bank*, 262 U. S. 649; *Bronson* v. *Kinzie*, 1 How. 311), and that subsequent legislation may not constitutionally change such remedy in any material respect, at least unless a substantially co-extensive remedy remains or is furnished thereby (*Edwards* v. *Kearzey*, 96 U. S. 595; *McCracken* v. *Hayward*, 2 How. 608, 612; *Oshkosh Water Works Co.* v. *Oshkosh*, 187 U. S. 437, 439; *Home Building & Loan Ass'n.* v. *Blaisdell*, 290 U. S. 398, 434).

In *McCracken* v. *Hayward, supra,* this Honorable Court stated this principle as follows (p. 612):

> "* * * The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. * * * If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party, to the injury of the other; hence any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution."

The direct application of these principles to statutory remedies for the enforcement of mortgages has been particularly noted by this Honorable Court.

Clark v. *Reynolds,* 8 Wall. 318, 322.

That the new Section 1083 makes material and substantial changes in the previously existing system of foreclosure, as the Court of Appeals has held herein, is undeniable. It changes the essential nature and purpose of a foreclosure proceeding from a method whereby a creditor might obtain a liquidation of his security and thereupon apply on his debt the amount of cash actually received, to a means whereby the debtor may obtain a valuation of the security by opinion evidence and thereupon force the creditor to apply the amount of such valuation on the debt, regardless of the price which said security had brought on the actual sale and regardless of whether

the creditor or a third person had bid it in. The provisions of the new section neither require nor permit consideration of any equitable factors or of the relative circumstances of the parties, but compel every mortgagee in every situation to bid in the property in foreclosure at a price at least equal to the valuation which may thereafter be fixed by the court or to forego satisfaction of so much of the mortgage debt as equals the difference between the value so fixed and a lower price bid on a sale to a third party.

Applied to pre-existing contracts, therefore, the practical effect of the new Section 1083 is to change the medium of payment agreed upon by the parties from lawful money of the United States to a parcel of real property. Nor is the debtor required to pay "money's worth" in such real property, for he must be credited on his debt with the amount of a hypothetical valuation of such property, regardless of whether the creditor ever actually realizes that amount thereon.

In this connection it should be observed that while the very fact of the foreclosure at bar presumably imports the inability of the mortgaged property to earn sufficient to carry itself under the normal conditions which the new Section 1083, as permanent legislation, presupposes, no provision is made in said section for reimbursing the Bank for such losses as it may sustain in maintaining the property until the time it realizes thereon the "determined market value", assuming that that time eventually arrives—a factor of direct, practical significance to the Bank which, as a national bank, is prohibited by statute from holding property thus acquired for a longer period than five years (*44 Stat. 1227, Chap. 191, Section 3, U. S. C. A. Title 12, Section 29*).

Likewise indisputable is the finding of the Court of Appeals in the case at bar that no remedy substantially equivalent to that afforded by the old Section 1083 remains to the mortgagee under the local law. The right to recover the mortgage debt at law, apart from the mortgage security, is circumscribed by a statutory prohibition against the levy of execution on the mortgagor's equity of redemption (*New York Civil Practice Act, §710*). The maintenance of a second action, after foreclosure, to recover a deficiency resulting from the foreclosure sale is prohibited by statute except by leave of the court (*New York Civil Practice Act, §1078*), but settled authority is against the granting of such leave in respect of a party who could have been made a defendant in the foreclosure action unless special circumstances are shown manifestly requiring that relief (*Equitable Life Assurance Society* v. *Stevens*, 63 N. Y. 341; *Scofield* v. *Doscher*, 72 N. Y. 491; *Vanderbilt* v. *Schreyer*, 91 N. Y. 392; *Morrison* v. *Slater*, 128 App. Div. 467; *Darmstadt* v. *Manson*, 144 App. Div. 249; *Stehl* v. *Uris*, 210 App. Div. 444). Whether the new Section 1083 has superseded Section 1078 so as to forbid the granting of such leave in any case was left open by the Court of Appeals in its opinion at bar, but some indication was given that such a holding was not improbable (see *Honeyman* v. *Hanan*, 275 N. Y. 382, 392).

State statutes similar in purpose and effect to the new Section 1083 have in the past been held unconstitutional by this Honorable Court in so far as they were sought to be applied to contracts in existence at the time of their enactment.

Bronson v. *Kinzie*, 1 How. 311;
McCracken v. *Hayward*, 2 How. 608;
Gantly's Lessee v. *Ewing*, 3 How. 707.

In *McCracken* v. *Hayward, supra*, the invalidated statute provided that no execution sale could be held unless the

property to be sold would bring two-thirds of its value according to the opinion of three householders.

In *Gantly's Lessee* v. *Ewing, supra,* a statute of the State of Indiana prohibiting foreclosure sales for less than one-half the appraised value of the property was held unconstitutional, this Honorable Court saying (pp. 716-717):

> "The contract of mortgage was a vested interest, and its main incident a right to have the land applied in discharge of the debt, either by an execution executed, as on a judgment at law, or in some form of remedy substantially equal. The new remedy, prescribed by the Act of 1341, changed the contract and required among other things that the mortgaged premises should not be sold to satisfy the debt unless they were first valued and one-half of that value was bid for them. If the legislature could make this alteration in the contract, and in the decree enforcing it, so it could declare the property should bring its entire value, or that it should not be sold at all; thereby impairing, or defeating the obligation under the disguise of regulating the remedy. This court held in *Bronson* v. *Kinzie,* 1 How. 319, that the right, and a remedy substantially in accordance with the right, were equally parts of the contract, secured by the laws of the state where it was made; and that a change of these laws, imposing conditions and restrictions on the mortgagee, in the enforcement of his contract, and which affected its substance, impaired the obligation, and could not prevail; as an act directly prohibited, could not be done indirectly."

At the October, 1937 Term, this Honorable Court denied certiorari in a case in which the Supreme Court of South Carolina had held unconstitutional the retroactive applica-

tion of a statute virtually identical with the new Section 1083.

Jefferies v. *Federal Land Bank*, 302 U. S. 708.

In recent years numerous state courts of last resort have voided similar statutes as applied retroactively.

Bontag v. *McCurdy*, 59 Pac. (2d) 326 (Ariz.);
Adams v. *Spillyards*, 61 S. W. (2d) 686 (Ark.);
Hales v. *Snowden*, 65 Pac. (2d) 847 (Cal.);
Atlantic Loan Co. v. *Peterson*, 181 Ga. 266;
Vanderbilt v. *Brunton Piano Co.*, 111 N. J. L. 596;
Federal Land Bank v. *Garrison*, 193 S. E. 308 (S. C.), cert. denied *sub nom. Jefferies* v. *Federal Land Bank, supra*;
Langever v. *Miller*, 76 S. W. (2) 1025 (Tex.).

The case of *Honeyman* v. *Jacobs*, 306 U. S. 539, on which the appellant relies, is plainly distinguishable from the case at bar. First, the statute under consideration in the *Honeyman* case (*Section 1083a of the New York Civil Practice Act*) was moratory legislation, occasioned by a pressing public emergency legislatively declared, and was, by express limitations of both scope and duration, specifically adapted to the relief of that emergency. The vital distinctions between such an enactment and the permanent legislation here involved have heretofore been observed by this Honorable Court (*W. B. Worthen Co.* v. *Thomas*, 292 U. S. 426; *Worthen Co.* v. *Kavanaugh*, 295 U. S. 56). Second, the value of the property in the *Honeyman* case was found "without question" to be equal to the mortgage debt. There is no such concession in the case at bar and even the appellant's evidence indicates the contrary (R. 22-24 and see Point II, *infra*).

In so far as the opinion of this Honorable Court in the *Honeyman* case may have indicated that the validity of the act there considered was sustainable, apart from the existent emergency, on the ground that it merely codified a power which courts of equity in New York have always possessed to control the measure of deficiency judgments in foreclosure actions, we respectfully submit that the Court of Appeals, in an unbroken line of decisions from earliest times to the case at bar, has held that no such equitable jurisdiction in foreclosure suits ever existed or now exists, apart from statute, in the State of New York.

Morris v. *Morange*, 38 N. Y. 172;
Wager v. *Link*, 134 N. Y. 122;
Frank v. *Davis*, 137 N. Y. 275;
Feiber Realty Corp. v. *Abel*, 265 N. Y. 94;
Emigrant Industrial Savings Bank v. *Van Bokkelen*, 269 N. Y. 110;
Guaranteed Title & Mortgage Co. v. *Scheffres*, 275 N. Y. 30.

Historically, the lack of such power traces back to the days when courts of law and courts of equity were separate and the jurisdiction of the equity court in a foreclosure action ceased when the foreclosure sale was confirmed, the creditor being obliged to resort to a separate action at law for any deficiency judgment. The following excerpt from the opinion of Chief Judge Earl of the Court of Appeals in *Frank* v. *Davis*, 135 N. Y. 275, 277-8, summarizes the matter succinctly:

> "In England, and in this state prior to the Revised Statutes, the Court of Chancery, in an action to foreclose a mortgage, was not supposed to have jurisdiction to render a personal judgment against the mort-

> gagor upon his bond or covenant to pay the mortgage debt, and such a judgment could only be obtained by an action at law. (*Noonan* v. *Lee*, 2 Black 499, 501; *Orchard* v. *Hughes*, 1 Wall. 73; *Dunkley* v. *Van Buren*, 3 Johns. Ch. 330; *Jones* v. *Conde*, 6 id. 77; *Globe Ins. Co.* v. *Lansing*, 5 Cow. 380; *Sprague* v. *Jones*, 9 Paige 252; *Equitable Life Ins. Socy.* v. *Stevens*, 63 N. Y. 341, 344; *Burroughs* v. *Tostevan*, 75 N. Y. 567, 572.) This was an exception to the general rule, that where a court of equity obtains jurisdiction of an action it will retain it and administer full relief, both legal and equitable, so far as it pertains to the same transaction or the same subject-matter (*Lynch* v. *Elevated Railroad Co.*, 129 N. Y. 274; *McGean* v. *The Same*, recently decided in this court [133 N. Y. 9])."

The decisions of the New York Appellate Division, an intermediate appellate court, in *Monaghan* v. *May*, 242 App. Div. 64 and *Guaranteed Title & Mortgage Co.* v. *Scheffres*, 247 App. Div. 294, have both been overruled by the Court of Appeals. In *Emigrant Industrial Savings Bank* v. *Van Bokkelen*, 269 N. Y. 110, the Court of Appeals said of the former case (p. 116):

> "Perhaps it should be said that we do not approve the decision in *Monaghan* v. *May* (*supra*)."

In the latter case (*Guaranteed Title & Mortgage Co.* v. *Scheffres*), on appeal from the final order (275 N. Y. 30), the Court of Appeals reversed the order of the Appellate Division which had affirmed the order of the Special Term entered pursuant to the earlier decision in 247 App. Div. 294 and reinstated the deficiency judgment previously granted to the plaintiff.

In the case at bar, the Court of Appeals, after reconsideration, has again rejected the doctrine of *Monaghan* v. *May*, and has reaffirmed its previous declarations that equity courts in New York possess no inherent power to

control the measure of deficiency judgments in foreclosure actions.

Of course, equity courts have always had and still have power to refuse confirmation of foreclosure sales where equitable grounds, *i. e.*, fraud, collusion, inadequacy of price so gross as to shock the conscience of the court, etc., are present and affirmatively established,* but in any such case the only relief which the court could grant the mortgagor would be to order a resale. The Court of Appeals in *Emigrant Industrial Savings Bank* v. *Van Bokkelen*, 269 N. Y. 110, has stated the proposition thus (p. 115):

> "The court had an undoubted discretion within limits to refuse confirmation of the report of sale, or to open the sale made to the plaintiff bank under the judgment, and in either case to order a resale. (*Brown* v. *Frost*, 10 Paige 243; *Crane* v. *Stiger*, 58 N. Y. 625; *Hale* v. *Clauson*, 60 N. Y. 339; *Fisher* v. *Hersey*, 78 N. Y. 387.)"

In respect of all of the foregoing matters of local law, the pronouncements of the Court of Appeals are, we submit, controlling and conclusive upon this Honorable Court.

Erie Railroad Co. v. *Tompkins*, 304 U. S. 64;
Ruhlin v. *New York Life Insurance Co.*, 304 U. S. 202.

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* No such equitable grounds are present in the case at bar: no fraud or collusion was ever claimed, and although appellant asserted in its cross-motion that "the sale price was wholly inequitable and unconscionable", no appeal was taken by it from the Appellate Division's affirmance of the denial of said cross-motion by the Supreme Court, Kings County. The appellate courts below have found that the price was not shockingly inadequate and that no likelihood of any greater realization on a resale had been shown (257 App. Div. at 467; 284 N. Y. at 15). In fact the price represented the fair and reasonable market value of the property (see Point II, *infra*).

The case of *Richmond Mortgage & Loan Corp.* v. *Wachovia Bank & Trust Co.*, 300 U. S. 124, is not, as appellant asserts, contrary to the instant decision, but is entirely reconcilable therewith. In the cited case, this Honorable Court held that a North Carolina statute, which applied only where the sale was by a trustee under a power of sale in the mortgage deed and only where the mortgagee was the purchaser at such sale, did not impair the obligation of contract because the remedy of strict foreclosure in equity which remained to the mortgagee was substantially co-extensive with the remedy affected by the statute. The governing principle of this decision is unquestioned, but its application to the case at bar leads to the opposite result in view of the inequivalence and inadequacy of the remaining remedies afforded by the law of New York as construed by the Court of Appeals.

The decision at bar is sustainable upon a further ground. At the time the mortgage herein was made and at the time the moneys secured thereby were advanced, mortgages executed on and after July 1, 1932 were, by express statutory exception, excluded from the coverage of the moratory deficiency judgment act (*Laws of 1933, Chap. 794, Sec. 4*). The stimulation of business by the encouragement of new loans was an integral part of the legislative policy in dealing with the then existing emergency. In effect, therefore, there was direct legislative assurance to lenders that loans secured by mortgages made after July 1, 1932 would be enforceable in the manner provided by the then Section 1083, *i. e.*, with deficiency judgments for the full residue of the debt, and the parties at bar must be deemed to have contracted in reliance upon that legislative assurance. While this assurance may not have the full contractual force of the government bonds involved in the "Gold Clause" cases, there is sufficient analogy in the legislative attempt, by the new Section

1083, to revoke its pledge retroactively, to give appreciable aptness to the following language of this Honorable Court in one of said cases, *Perry* v. *United States,* 294 U. S. 330, 351:

> "By virtue of the power to borrow money '*on the credit of the United States*', the Congress is authorized to pledge that credit as an assurance of payment as stipulated,—as the highest assurance the Government can give, its plighted faith. To say that the Congress may withdraw or ignore that pledge, is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our Government."

An even closer analogy is found in the case of *Home Owners Loan Corp.* v. *Robinson,* 285 N. W. 768 (Wis.), where a mortgage moratorium statute contained a section expressly exempting federal agencies from its operation. While this exemption was in effect, a mortgage loan was made by the plaintiff, a federal agency. Thereafter the exemption section was repealed. In the subsequent foreclosure suit, the Supreme Court of Wisconsin overruled the defendant's contention that the moratorium statute was applicable, holding that the legislature could not, by such repeal, retroactively revoke an exemption which had existed when the mortgage was made.

Upon all of the foregoing grounds and in the light of the local law as conclusively interpreted, we respectfully submit that the Court of Appeals was correct in holding that the new Section 1083, in its application to the mortgage at bar, is a clear violation of the mandatory restriction embodied in Section 10 of Article I of the Federal Constitution and is therefore void.

Upon the same analysis and for the same reasons the new Section 1083, as applied to the mortgage at bar, is violative of Section 6 of Article I of the Constitution of the State of New York and is also invalid thereunder.

Sliosberg v. *New York Life Insurance Co.*, 217 App. Div. 67, 72, affd. 244 N. Y. 482;
People ex rel. v. *Otis*, 90 N. Y. 48, 52a.

POINT II.

The judgment appealed from is entirely sustainable, apart from the constitutional question.

Assuming, *arguendo*, that the new Section 1083 may constitutionally be applied to the mortgage at bar, the proceedings in the Supreme Court, Kings County were, as a matter of local practice, a compliance with the requirements of said section sufficient, even under the dissenting opinion of Judge Lewis of the Court of Appeals, to constitute an application for a judgment thereunder.

Considering the facts and circumstances at bar as upon such an application, the judgment appealed from, we submit, represents a proper exercise of the discretion vested in the court by the new Section 1083 to award a deficiency judgment for "the whole residue, or so much thereof as the court may determine to be just and equitable, of the debt remaining unsatisfied * * *".

The Bank is a national bank engaged in a commercial banking business. The loans secured by the guaranty of the appellant's testator, which was in turn secured by the mortgage at bar, were ordinary commercial loans to a business corporation. They were not advances made on the security of real estate and neither by the agreement

of the parties nor by any reasonable construction of their transaction was real estate to be the primary source of repayment. It would be neither "just" nor "equitable" to compel the Bank to credit upon the indebtedness thus incurred an amount in excess of the actual proceeds of the foreclosure sale of the property which, at most, was secondary security. In fact, any such requirement would be contrary to the public interest in the stability and liquidity of banks (see *Rothschild* v. *Manufacturers Trust Co.*, 279 N. Y. 355, 359-361). The Bank could not have agreed at the inception of the transaction to accept land in repayment, for that would have been, in effect, an agreement to purchase real property, which is prohibited by the National Banking Act (*44 Stat. 1277, Chap. 191, Sec. 3; U. S. C. A. Title 12, Sec. 29*). The public policy underlying this statute is the desirability of keeping the capital of banks liquid and of preventing the accumulation of real estate in their hands (*National Bank* v. *Matthew*, 98 U. S. 621, 626), and it would be a manifest frustration of that policy to permit a borrower to convert his obligation to repay his loan in cash into a right to repay it with real estate merely because the bank had taken a mortgage as additional security.

Nor is the instant decision unjust or inequitable to the appellant. The situation at bar does not involve the intervention of an unforeseen economic catastrophe between the date the obligation was incurred and the time for its repayment. The debt at bar was contracted in 1937 and was to be repaid within a short time. The same general economic conditions prevailed throughout this period.

On the other hand the reliance of the Bank upon the aforementioned legislative assurance that the enforcement of this loan would be governed by the old Section 1083 would abundantly warrant the favorable exercise of the discretion vested in the court to award a judgment that is "just and equitable".

Apart from all other considerations, moreover, the judgment appealed from is entirely sustainable on the ground that the price realized at the foreclosure sale represented, as a matter of fact, the fair and reasonable market value of the premises at the time of such sale.

The essential facts concerning the mortgaged property are not in dispute. The premises are approximately 25 x 100 feet and are located at 38th Street and 4th Avenue, Brooklyn, New York. They are improved with a two story brick building containing a cellar, a store and dwelling quarters for one family, with two garages. It was estimated by both parties that (after reserving $100, approximately 8% of the gross rental value, for vacancies), the property will produce a gross annual income of $1100 (R. 26). The out-of-pocket operating expenses are $441 for taxes, $50 for insurance, $20 for water, and $100 for repairs and supplies, making a total of $611 (R. 26), and leaving a net annual income of $489, without considering any reserve for depreciation, taxes other than real estate taxes, expenses for collecting rents, supervision of building, etc.

Based on an estimated net annual income of approximately $500, Harold M. Mills, a real estate expert, in an affidavit submitted by the Bank on the proceedings in the Supreme Court, Kings County (R. 25-27), appraised the property at $6,500. If this estimated net annual income be reduced by a suitable amount for the aforementioned reserves and the appraisal commensurately decreased, a valuation of $4,000 becomes entirely fair and reasonable.

No sound measure of value may be predicated upon the fact that the premises were assessed for tax purposes at $15,000. On this assessment the tax is $441, which is more than 40% of the estimated gross annual income and more than 70% of the total expenses of the property. Clearly, therefore, this assessment is excessive and, as

Mr. Mills pointed out, is a serious factor in depressing the market value of the property (R. 27).

Finally, the fact that the National City Realty Company offered the property for sale at $6,500 (R. 27) is tangible confirmation that the bid of $4,000 actually represented the fair and reasonable market value of said property. With the deduction from the offering price usually necessary to conclude a bargain, and with broker's commissions and other expenses of sale, the realization of more than $4,000 net on a sale based on such initial offering price is doubtful.

We respectfully submit, therefore, that the Bank was properly adjudged by the Supreme Court, Kings County to be entitled to a deficiency judgment for the full residue of the debt and that said judgment is entirely sustainable, apart from the constitutional question, on that ground.

CONCLUSION.

The judgment appealed from should be affirmed.

Respectfully submitted,

BARNEY B. FENSTERSTOCK,
Solicitor for Appellee.

ZALKIN & COHEN,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

No. 740.—October Term, 1940.

Julia C. Gelfert, as Sole Surviving Executor of the Last Will and Testament of James J. Carpenter, Deceased, Petitioner,
vs.
National City Bank of New York.

On Writ of Certiorari to the Supreme Court of the State of New York.

[April 28, 1941.]

Mr. Justice Douglas delivered the opinion of the Court.

This action was brought by respondent to foreclose a mortgage made in December, 1932, by Carpenter. At that time § 1083 of the New York Civil Practice Act provided that the amount of the deficiency judgment was to be measured by the residue of the debt remaining unsatisfied after a sale of the mortgaged property and the application of the proceeds pursuant to the directions contained in the judgment. In November, 1938, a judgment of foreclosure and sale was entered for $18,401.25, and in December, 1938, the foreclosure sale was held at which the property was purchased by respondent's nominee for $4,000. The referee, appointed by the court to sell, reported a deficiency which after the inclusion of taxes, fees and expenses was computed at $16,162.12. Respondent moved to confirm the referee's report of sale and asked that a deficiency judgment be entered for that amount. Petitioner took exceptions to the report and made a cross-motion to have the court fix the value of the property for the purpose of determining the amount of the deficiency judgment on the ground that the sale price was "wholly inequitable and unconscionable". A new § 1083[1] (L.

[1] That section provides:

"Judgment for deficiency; limitation. If a person who is liable to the plaintiff for the payment of the debt secured by the mortgage is made a defendant in the action, and has appeared or has been personally served with the summons, the final judgment may award payment by him of the whole residue, or so much thereof as the court may determine to be just and equitable, of the debt remaining unsatisfied, after a sale of the mortgaged property and the application of the proceeds, pursuant to the directions con-

1938, ch. 510), effective April 7, 1938, provides in substance that the court in determining the amount of a deficiency judgment should, on appropriate motion, "determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises" and should deduct from the amount of the debt the "market value as determined by the court or the sale price of the property whichever shall be the higher." The right to recover any deficiency is made dependent on the making of such a motion. The court denied petitioner's cross-motion[2] and directed the entry of a deficiency judgment for $16,162.12. The judgment of the Appellate Division denying respondent a deficiency judgment because it had not made a motion for one under the new § 1083 (257 App. Div. 465, 13 N. Y. S. (2d) 600), was reversed by the Court of Ap-

tained in such judgment, the amount thereof to be determined by the court as herein provided. Simultaneously with the making of a motion for an order confirming the sale provided such motion is made within ninety days after the date of the consummation of the sale by the delivery of the proper deed of conveyance to the purchaser in all cases where the sale is held after the date this section as hereby amended takes effect, and in all cases where the sale was held prior to the date this section as hereby amended takes effect and said sale has not heretofore been confirmed, then within ninety days from the date this section as hereby amended takes effect or within ninety days after the date of the consummation of the sale by delivery of the proper deed of conveyance to the purchaser, regardless of whether the sale was held prior or subsequent to or on the date this section as hereby amended takes effect, the party to whom such residue shall be owing may make a motion in the action for leave to enter a deficiency judgment upon notice to the party against whom such judgment is sought or the attorney who shall have appeared for such party in such action. Such notice shall be served personally or in such other manner as the court may direct. Upon such motion the court, whether or not the respondent appears, shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date such premises were bid in at auction or such nearest earlier date as there shall have been any market value thereof and shall make an order directing the entry of a deficiency judgment. Such deficiency judgment shall be for an amount equal to the sum of the amount owing by the party liable as determined by the judgment with interest, plus the amount owing on all prior liens and encumbrances with interest, plus costs and disbursements of the action including the referee's fee and disbursements, less the market value as determined by the court or the sale price of the property whichever shall be the higher. If no motion for a deficiency judgment shall be made as herein prescribed the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist. . . ."

[2] An affidavit of a real estate broker submitted by petitioner in support of his cross-motion stated that in his opinion the fair market value of the property was $11,000. An affidavit of an appraiser submitted by respondent in opposition stated that in his view the fair market value of the property was $6,500. The property was assessed by New York City for tax purposes at $15,000.

peals which held, one judge dissenting, that the new § 1083 as applied to mortgage contracts previously made violated the contract clause of the Federal Constitution. 284 N. Y. 13, 29 N. E. (2d) 449. We granted the petition for certiorari because of the important constitutional question which was raised.

As noted by the Court of Appeals the measure of a deficiency under the new § 1083 is in substance the same as that prescribed by the New York moratory deficiency judgment act—§ 1083-a of the Civil Practice Act. The latter section was sustained by this Court under the contract clause of the Federal Constitution in *Honeyman* v. *Jacobs*, 306 U. S. 539. But the Court of Appeals said that the new § 1083, unlike the moratory deficiency judgment act, is not addressed to a declared public emergency, is unrestricted in its application,[3] "concerns merely the private contract relationship of the parties to a real property mortgage," is not "designed for the relief of urgent public needs," is not "conditioned upon any equitable factor," leaves "no room for the play of any equitable consideration," benefits "every mortgagor irrespective of the character or amount of his investment," and burdens "every mortgagee no matter what his necessities". The Court pointed out that under previously existing statutes of New York the liability for a deficiency was to be finally determined by a judgment of foreclosure and sale, that the "subsequent docketing of a deficiency judgment was a merely clerical act", and that the deficiency was to be ascertained by a sale and "not by the estimates of witnesses or other less satisfactory evidence". It held that that system of foreclosure "entered into the engagement of the present parties and created and defined the legal and equitable obligations of their contract". It also pointed out that unlike the situation in *Richmond Mortgage & Loan Corp.* v. *Wachovia Bank & Trust Co.*, 300 U. S. 124, there remained under the laws of New York no remedy available to the mortgagee which was "substantially coextensive" with that afforded by the old § 1083, since, though an action at law for the debt might lie, the judgment debtor's equity of redemption could not be sold under an execution upon that judgment and since the right to bring a second action to recover a deficiency resulting on a foreclosure sale, if it existed at all under the new legislation, was dras-

[3] The moratory deficiency judgment act did not apply to mortgages or connected agreements dated on or after July 1, 1932. See 284 N. Y. 13, 16-17.

tically restricted. Accordingly, it held that in light of such cases as *Barnitz* v. *Beverly*, 163 U. S. 118, the new § 1083 could not be applied to mortgage contracts previously made without violation of the contract clause of the Federal Constitution.

We take a different view.[4]

The formula which a legislature may adopt for determining the amount of a deficiency judgment is not fixed and invariable. That which exists at the date of the execution of the mortgage does not become so embedded in the contract between the parties, that it cannot be constitutionally altered. As this Court said in *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 435, "Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." And see *Voeller* v. *Neilston Warehouse Co.*, 312 U. S. —. It is that reserved legislative power with which we are here concerned.

The control of judicial sales of realty by courts of equity and by legislatures in order to prevent sacrificial prices has a long history. Weiner, Conflicting Functions of the Upset Price, 27 Col. L. Rev. 132, 133, *et seq.* In chancery sales in England during the eighteenth century there developed the practice of opening the bidding, prior to confirmation, on an offer to advance the price 10 per cent. *Graffam* v. *Burgess*, 117 U. S. 180, 191. That practice, much criticized by Lord Eldon, was gradually supplanted by reserved bidding —in the first instance by equity (*Jervoise* v. *Clarke*, 1 Jac. & W. 388) and subsequently by statute. Sale of Land by Auction Act, 1867, 30 & 31 Vict. c. 48, § 7; *Graffam* v. *Burgess, supra*, p. 191; 1 Daniell, Chancery Practice (7th ed. 1901) pp. 879-880. Though the early English rule of advance bidding found little foothold in this country, reserved bidding has its counterpart here in the occasional utilization by equity courts of the upset price in mortgage foreclosures. *Blair* v. *St. Louis, H. & K. R. Co.*, 25 Fed. 232; *Pewabic Mining Co.* v. *Mason*, 145 U. S. 349; 2 Bonbright, Valuation of Property, pp. 849, *et seq.*; Stetson *et al.*, Some Legal Phases of Corporate Financing, Reorganization and Regulation (1927), p.

[4] We are concerned here solely with the application of this statute to a situation where the mortgagee purchases the property at foreclosure sale. We intimate no opinion on its constitutionality as applied to the case where the mortgagee is not the purchaser.

202. And it is quite uniformly the rule in this country, as in England, that while equity will not set aside a sale for mere inadequacy of price,[5] it will do so if the inadequacy is so great as to shock the conscience or if there are additional circumstances against its fairness, such as chilled bidding. *Cocks* v. *Izard*, 7 Wall. 559; *Graffam* v. *Burgess, supra; Ballentyne* v. *Smith*, 205 U. S. 285. Beyond that, a number of states by statute have endeavored to prevent property going for a song at judicial sales. Provisions that the property shall not be sold at less than a designated percentage of its appraised value, and requirements that a stated percentage of the appraised value above the sales price must be credited on the debt are illustrative. 3 Jones, Mortgages (8th ed. 1928) §§ 1695 *et seq.;* 2 Bonbright, Valuation of Property, pp. 839 *et seq.*

We mention these matters here because they indicate that for about two centuries there has been a rather continuous effort either through general rule or by appeal to the chancellor in specific cases to prevent the machinery of judicial sales from becoming an instrument of oppression. And so far as mortgage foreclosures are concerned numerous devices have been employed to safeguard mortgagors from sales which will or may result in mortgagees collecting more than their due. The variety of formulae which has been employed to that end is ample evidence not only of the intrusion which advanced notions of fairness have made on the earlier concern for stability of judicial sales but also of the flexibility of the standards of fairness themselves. Underlying that change has been the realization that the price which property commands at a forced sale may be hardly even a rough measure of its value. The paralysis of real estate markets during periods of depression, the wide discrepancy between the money value of property to the mortgagee and the cash price which that property would receive at a forced sale, the fact that the price realized at such a sale may be a far cry from the price at which the property would be sold to a willing buyer by a willing seller reflect the considerations which have motivated departures from the theory that competitive bidding in this field amply protects the debtor.

[5] But see Suring State Bank v. Giese, 210 Wis. 489; Wilson v. Fouke, 188 Ark. 811; Teachers' Retirement Fund Ass'n v. Pirie, 150 Ore. 435.

Mortgagees are constitutionally entitled to no more than payment in full.[6] *Honeyman* v. *Jacobs, supra.* They cannot be heard to complain on constitutional grounds if the legislature takes steps to see to it that they get no more than that. As we have seen, equity will intervene in individual cases where it is palpably apparent that gross unfairness is imminent. That is the law of New York. 284 N. Y. 13, 20. And see *Fisher* v. *Hersey,* 78 N. Y. 387. But there is no constitutional reason why in lieu of the more restricted control by a court of equity the legislature cannot substitute a uniform comprehensive rule designed to reduce or to avoid in the run of cases the chance that the mortgagee will be paid more than once. Cf. *Suring State Bank* v. *Giese,* 210 Wis. 489. Certainly under this statute it cannot be said that more than that was attempted. The "fair and reasonable market value" of the property has an obvious and direct relevancy to a determination of the amount of the mortgagee's prospective loss. In a given case the application of a specified criterion of value may not result in a determination of actual loss with mathematical certitude. But "incidental individual inequality" is not fatal. *Phelps* v. *Board of Education,* 300 U. S. 319, 324. The fact that men will differ in opinion as to the adequacy of any particular yardstick of value emphasizes that the appropriateness of any one formula is peculiarly a matter for legislative determination. Certainly, so far as mortgagees are concerned, the use of the criterion of "fair and reasonable market value" in cases where they obtain the property for a lesser amount holds promise of tempering the extremes of both inflated and depressed market prices. And so far as mortgagors are concerned, it offers some assurance that they will not be saddled with more than the amount of their obligations. To hold that mortgagees are entitled under the contract clause to retain the advantages of a forced sale would be to dignify into a constitutionally protected property right their chance to get more than the amount of their contracts. *Honeyman* v. *Jacobs, supra.* The contract clause does not protect such a strategical, procedural advantage.

In conclusion, the statute in question, like the one involved in *Richmond Mortgage & Loan Corp.* v. *Wachovia Bank & Trust Co.,*

[6] As to the bankruptcy power see Wright v. Union Central Life Ins. Co., 311 U. S. 273, and cases cited.

supra, p. 130, "cannot fairly be said to do more than restrict the mortgagee to that for which he contracted, namely, payment in full." Here, as in that case, the obligation of the mortgagee's contract is recognized; the statute does no more than limit "that right so as to prevent his obtaining more than his due." *Id.*, p. 130. To be sure, the mortgagee retained in that case an alternative remedy while in the instant one the Court of Appeals has said that under New York law there remained no alternative remedy "substantially coextensive" with that which had been removed. But it is clear from *Honeyman* v. *Hanan*, 302 U. S. 375, that a requirement that the right to a deficiency judgment should be determined in the foreclosure proceeding or that a mortgagee is not entitled to a deficiency judgment unless he moves for one raises no substantial federal question. As stated by this Court in that case (302 U. S. at p. 378), the Federal Constitution does not prevent the states from determining, on due notice and opportunity to be heard, "by what process legal rights may be asserted or legal obligations" enforced. The principles of those cases are applicable here. The fact that an emergency was not declared to exist when this statute was passed does not bring within the protective scope of the contract clause rights which were denied such protection in *Honeyman* v. *Jacobs, supra.* See *Home Building & Loan Assn.* v. *Blaisdell, supra.*

Respondent points out that earlier decisions of this Court have struck down under the contract clause, as respects contracts previously made, a state statute requiring judicial sales to bring two-thirds of the amount of the appraised value of the property. *Bronson* v. *Kinzie*, 1 How. 311; *McCracken* v. *Hayward*, 2 How. 608. And see *Gantly's Lessee* v. *Ewing*, 3 How. 707. Those cases, however, have been confined to the special circumstances there involved. *Home Building & Loan Assn.* v. *Blaisdell, supra*, pp. 431-434. We cannot permit the broad language which those early decisions employed to force legislatures to be blind to the lessons which another century has taught.

The judgment is reversed and the cause is remanded to the New York Supreme Court for proceedings not inconsistent with this opinion.

It is so ordered.